

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 - - - - - X
4 UNITED STATES OF AMERICA, :
5 : 13-CR-72(DRH)
6 -against- :
7 : United States Courthouse
8 JUSTIN KALIEBE, : Central Islip, New York
9 Defendant. :
10 : Friday, July 1, 2016
11 : 10:00 a.m.
12 - - - - - X

13 TRANSCRIPT OF CRIMINAL CAUSE FOR FATICO HEARING
14 BEFORE THE HONORABLE DENIS R. HURLEY
15 UNITED STATES SENIOR DISTRICT COURT JUDGE

16 A P P E A R A N C E S:

17 For the Government: ROBERT L. CAPERS, ESQ.
18 United States Attorney
19 BY: MICHAEL CANTY, ESQ.
20 SETH D. DuCHARME, ESQ.
21 Assistant United States Attorneys

22 For the Defendant: BY: ANTHONY LaPINTA, ESQ.

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1 (Judge Hurley enters the courtroom.)

2 THE COURT: Both sides ready to proceed? Mr.
3 Canty?

4 MR. CANTY: Yes, your Honor.

5 THE COURT: Mr. La Pinta, you are as well.

6 MR. La PINTA: I am, your Honor.

7 Good morning.

8 THE COURT: Good morning.

9 Defense next witness.

10 MR. La PINTA: Yes. Before I begin, I want to
11 give you a bit of a preview how I expect to go forward
12 today, and ask actually for your approval.

13 I have a fact witness I'm starting off with today
14 whose name is Bial, B-i-a-l, Hito, H-i-t-o. Mr. Hito was a
15 member of the Bay Shore Mosque where Justin was attending
16 and where he met the undercover operative. He's not going
17 to be a long witness, but I believe he has relevant
18 information by virtue of his observations that could benefit
19 the court in assessing the situation.

20 After Mr. Hito's short testimony, I plan on
21 playing for the court snippets of the operative's
22 surreptitious recordings.

23 Now, what we have done for the sake of expediency,
24 we haven't recorded for the court's presentation today the
25 entire conversations leading up to what I consider to be the

1 relevant portions of the recordings. I have taken snippets.
2 I want the court to be abundantly clear and aware that
3 there's more dialogue that is involved, besides the snippets
4 I'm offering. If I introduce the entire dialogue, we'll be
5 here for two days. So what I would like to do is, if the
6 court would want to hear the dialogue, or if it is of
7 particular interest to you, then obviously we have all of
8 these recordings unedited or more elaborate context.

9 So I think this is the most relevant and efficient
10 way of doing it.

11 THE COURT: Has this been discussed with the
12 Government?

13 MR. La PINTA: I told them I'm offering certain
14 snippets of it.

15 THE COURT: Right.

16 MR. La PINTA: The snippets I'm offering are the
17 exact ones contained in my second submission to the court in
18 my reply sentencing memorandum.

19 THE COURT: Is there any Rule of 106 problem?

20 MR. CANTY: No, your Honor. For purposes of this
21 hearing, we'll accept the representation of defense counsel.
22 These are part of the authentic recordings we provided to
23 them. Certainly we have no reason that they wouldn't be.

24 In the event we feel there's an issue with respect
25 to completeness, we'll furnish the full recordings to the

1 court.

2 THE COURT: All right. That sounds like an
3 appropriate plan.

4 So after the snippets of the recordings, what
5 next? We have Mr. Hito. We have the snippets of the
6 recordings.

7 MR. La PINTA: Doctor Bardey is here. He's
8 outside. We'll finish off with his expert testimony.

9 THE COURT: All right. Very good.

10 MR. La PINTA: I hope to do that all before lunch,
11 with a hope and a prayer.

12 THE COURT: Very good. We'll start with Mr. Hito.

13 MR. La PINTA: One last comment, with your
14 approval.

15 THE COURT: Yes, sir?

16 MR. La PINTA: I would like to, before playing the
17 snippets, I would like to explain to the court in one or two
18 sentences the relevance of the snippets and how it pertains
19 to the defense's position. Is that okay?

20 THE COURT: That certainly is.

21 MR. La PINTA: And I'm referring to the exact
22 language that I had previously submit in my reply
23 memorandum.

24 THE COURT: Yes, sir.

25 MR. La PINTA: So the government is fully aware of

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1 what I'm about to say to the court. Thank you.

2 One moment.

3 (Pause)

4 THE COURT: Good morning, sir.

5 THE WITNESS: Good morning, your Honor.

6 B I L A L H I T O,

7 called as a witness, having been first duly sworn,
8 testifies as follows:

9 THE COURT: Very good. Thank you, sir. Please be
10 seated.

11 If you would state your first and last name and
12 spell each for the court reporter.

13 THE WITNESS: Sure. My first name is Bilal,
14 B-i-l-a-l. My last name is Hito, H-i-t-o.

15 THE COURT: Perfect. Thank you, sir.

16 MR. La PINTA: Thank you, your Honor.

17 THE COURT: Mr. La Pinta.

18 DIRECT EXAMINATION

19 BY MR. La PINTA:

20 Q Mr. Hito, before we begin with questions, I will ask
21 you to scoot up in your chair as close as you possibly can
22 to the microphone and speak into the microphone clearly,
23 loudly, and slowly.

24 Mr. Hito, how old are you?

25 A Thirty years old.

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1 Q Where do you reside?

2 A West Islip, New York.

3 Q Are you employed?

4 A Yes.

5 Q What do you do for a living?

6 A I'm a medical diagnosis technician, and also do real
7 estate on the side.

8 Q Selling of real estate?

9 A Buying and selling.

10 Q You are not a medically trained professional, are you,
11 in terms of having a medical degree of sorts?

12 A No.

13 Q You have certain certifications that will allow you to
14 complete diagnostic testing?

15 A Yes.

16 Q All right.

17 In your job as a diagnostic technician, have you
18 had the occasion to work closely in the medical offices of
19 endocrinologists?

20 A Yes, sir.

21 Q How long have you been doing this?

22 A About eight years now.

23 Q Okay.

24 Would you please tell Judge Hurley what your
25 educational background is?

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1 A Sure. So I have an Associate's in business
2 administration, and a Bachelor's in natural sciences.

3 Q Where did you attend college?

4 A Dowling College and my Associate's is from Suffolk
5 County Community College.

6 Q Okay.

7 Mr. Hito, were you a member of the Masjid Darul
8 Quran Mosque located in Bay Shore, New York?

9 A Yes.

10 Q And were a member of that mosque in the years 2011
11 through 2013?

12 A Yes.

13 Q I presume, sir, then, that you are of Muslim faith?

14 A Yes, I am.

15 Q And did you have any official positions at the mosque?

16 A I taught at the Sunday school, and that was for
17 children, you know, that went up to about grade school; and
18 I was also am a youth coordinator, youth programs, part of
19 the community that dealt with new commerce to the mosque.

20 Q Regarding your duties as a Sunday school teacher, would
21 you teach religion to them?

22 A Yes.

23 Q And these are children of members of the mosque?

24 A Correct.

25 Q All right.

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1 Would you explain to Judge Hurley what your role
2 was as the youth program coordinator?

3 A Well, we would design and, you know, set up programs
4 for the youth members there, and in addition to people who
5 were coming in new to the community, you have welcoming
6 parties and activities.

7 Q Is it fair to say that you were in charge of religious
8 programming and social activities for the younger members
9 there?

10 A Yes.

11 Q Okay.

12 And did you also have a position as a member of
13 the outreach committee?

14 A Yes.

15 Q And would you explain that role a little bit more
16 carefully, please?

17 A So, you know, we would send out literature to people
18 who had requested it. Sometimes schools reported trips,
19 come to the mosque and have presentations to that, and also
20 extended to people interested in the faith that wanted to
21 come in and wanted to learn more, embrace the faith, kind of
22 a stepping stone platform for them.

23 Q As part of your duties as the outreach committee
24 member, did you often deal with individuals that were
25 desirous of becoming members of the mosque?

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1 A Yes.

2 Q And did those members sometimes include individuals
3 that were willing to convert their existing religion to the
4 Muslim faith?

5 A Yes, correct.

6 Q Okay.

7 Back in 2011, to the best of your recollection,
8 how many members were part of this mosque?

9 A It is not to put a number on it, but I would give a
10 rough estimate that the occupancy or capacity for Friday
11 prayers, which is the largest gathering for the week, was
12 maybe around 400, 500. So, you know, then their family
13 members, some of the kids were in school because it's
14 Friday, and I would try to triple that number and say it is
15 anywhere from 1000 to 2000 people. At that time it was the
16 largest mosque in Long Island.

17 Q Okay.

18 Would it be fair to say that the members of the
19 mosque range from young children to adolescents to mid-age
20 adults to elderly folk?

21 A Yes, all age ranges. You heard babies crying and
22 people in wheelchairs with gray hair, elderly.

23 Q So, in general terms, would you please describe what
24 the mosque did there? What was the function of the mosque?
25 Was it purely for religious purposes, or was it more than

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1 that?

2 A More or less it is purely for religious purposes. Not
3 to get too long-winded, most of the Muslim immigration
4 started in the mid-sixties, so people that set up the mosque
5 that is in existence today they are probably the immigrant
6 generation, and set up the mosque generally like in their
7 own country, which is prayers, prayers bidding fair well to
8 the deceased, loved ones, and marriage ceremonies.

9 Q So would you agree it was predominantly for religious
10 purposes?

11 A Yes.

12 Q But there was also the social component to it as well?

13 A People coming together to celebrate the holidays in
14 prayer.

15 Q Mr. Hito, I will direct your attention to 2011.

16 Did you have an occasion to meet with a young man
17 named Justin Kaliebe?

18 A Yes, I did.

19 Q Would you explain to Judge Hurley the circumstances in
20 which you met Mr. Kaliebe? Let me direct you.

21 Did there come a time that Mr. Kaliebe and other
22 young students expressed an interest in becoming affiliated
23 with your mosque?

24 A Yes.

25 Q Do you know how old Mr. Kaliebe was at that time?

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1 A Around 16. I remember he was in high school, but kind
2 of the latter part.

3 Q And could you explain to Judge Hurley the circumstances
4 in which you first met Mr. Kaliebe?

5 A So we had a couple of conversations over the phone, and
6 he had some literature with a number on it, and he expressed
7 his desire to meet. We met in person, that's the first
8 encounter. I had picked him up, and when I saw him, I kind
9 of I didn't really know exactly -- at that point how old he
10 was. So, you know, he got in the car and we just started
11 talking. I was doing most of the talking. He kind of
12 seemed nervous, shy, timid. There were some things I
13 noticed socially awkward to a degree, kind of took a little
14 while for to be figured out. So I did most of the talking,
15 and I did notice things were a little bit different, you
16 know, than from the others.

17 Q Now, when you made your initial observations of Mr.
18 Kaliebe, in the your mind at the time did you associate the
19 way he looked and acted to other patients that you had seen
20 in the course of your duties in the medical field?

21 A Yes, I did. So I do tests on patients of all kinds,
22 and, you know, certain patients of hormonal imbalance, and
23 you can see on the chart and visually there were certain
24 signs that I saw of the body, in addition to just the
25 overall veneer interaction itself, social attraction.

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1 Q Once again this comparison you made, you kind of
2 thought it to yourself?

3 A Yes, of course.

4 Q That was based upon your experiences working in the
5 medical field, correct?

6 A Yes.

7 Q And you are not a doctor?

8 A No, I'm not a physician.

9 Q All right.

10 So, was the fact that Mr. Kaliebe -- the fact that
11 he was 16 years old at the time pose a concern to you?

12 A Yes, it did. I obviously was of age, and I realized
13 this was a minor, and I felt uncomfortable in the car. It
14 wasn't at the mosque or public setting yet, so I wanted to
15 meet with one or both of his parents, kind of getting the
16 okay or consent that it could be okay that me or other
17 members might pick him up at the time. He never drove, so
18 he relied on people to take him.

19 Q When you spoke to Mr. Kaliebe on the phone, did he
20 explain to you his then existing family circumstances?

21 A Yes. I asked him a little bit about himself and kind
22 of just straight into that, and it seemed like there were a
23 lot of problems at home, and briefly explained the family
24 situation. Spent some time here and there, and it was
25 something that really seemed upsetting. I would come to

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1 learn later on to what degree, but even in those initial
2 conversations, it seemed like there was some trouble.

3 Q You said it was upsetting. Were these observations
4 that you made by the manner that you spoke and afterward
5 visually when talking to him face-to-face?

6 A Yes.

7 Q Did there come a time when you met with Justin's father
8 Robert Kaliebe to inform him of your request to meet with
9 his son regarding potential membership at the mosque?

10 A Yes. I asked Justin to arrange something, and me and a
11 friend from the mosque we all went out to lunch. Justin and
12 his father and me and my friend got to know each other, had
13 small talk, talked a little bit about what goes on, and it
14 was a nice encounter. That kind of set the stage for him to
15 be able to get permission to attend.

16 Q If you could, just raise the level of your voice
17 louder.

18 A Sure.

19 Q After meeting with Mr. Robert Kaliebe, did he give you
20 permission to speak with Justin regarding his desire to
21 become a member of the mosque?

22 A Yes.

23 Q Let me stop you there.

24 A Sure.

25 Q After gaining permission from Robert about Justin

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1 Kaliebe, did you have a more elaborate face-to-face
2 encounter with Justin?

3 A Yes.

4 Q Explain to the court what your observations were of
5 Justin during that initial face-to-face meeting that you
6 had?

7 A So there was a degree of social awkwardness. I had to
8 lead and steer the conversation. Eye contact was minimal.
9 You know, just certain things seemed a little bit off, and,
10 of course, I didn't want to ask someone about that, their
11 development or anything like that, just out of etiquette.

12 Q Okay.

13 Did he seem nervous in your dealings in terms of
14 his body movement?

15 A Yeah. Like I said, the first I notice was the seat
16 belt situation, kind of limper hands, you know, the way he
17 moved, the way he walked, carried himself.

18 Q When you spoke to him, did you find that he was
19 engaging?

20 A Not that much, no. He wasn't have engaging.

21 Q So when you spoke with him and had discussion, were you
22 doing all of the talking or was he?

23 A Yes, yes, in general me or anybody else. He was more
24 of the bystander, you know.

25 Q Okay.

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1 When he spoke, did he speak with fluency in terms
2 of his elaborate discussion, or did he keep his answers
3 minimal?

4 A It was minimal, you know.

5 Q Did you come to learn upon meeting him face-to-face
6 more facts and circumstances regarding his family history?

7 A Yes.

8 Q And were you able to observe, in your discussion with
9 him, his the state of being, whether he was happy, sad, or
10 depressed?

11 A Yes. So initially he was very sad, depressed, and it
12 continued like that. But, you know, as he got integrated
13 into the community, he started becoming, you know, popular
14 and welcomed, and you saw that he felt appreciative of that,
15 and that changed the way he acted.

16 Q Okay.

17 If you can, Mr. Hito, can you be more specific in
18 terms of what you observed that led you to the opinion that
19 he became more happy?

20 A I mean, he was known as the mosque's lap child.

21 Q Lap child?

22 A Yes.

23 Q What do you mean by that?

24 A He was like, you know, as if he was the grandchild of
25 every member there. People liked him, and everybody knew

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1 his name, and he would, you know, be attending every
2 program, come in early, stay late, interacting with anybody
3 and everybody. And his demeanor, he was smiling. He was
4 doing more talking. So, you know, it seemed like a very
5 positive progression.

6 Q Would it be fair to say, based upon your description of
7 these interactions, members of the mosque embraced Justin?

8 A Absolutely, absolutely.

9 Q And they would be members that vary from children to
10 adolescents to adults to elder folk?

11 A Yes.

12 MR. La PINTA: One moment, please.

13 (Pause)

14 MR. La PINTA: Your Honor, I've discussed with the
15 government a situation that is necessary to explain to the
16 court.

17 Mr. Hito in his dealings with the mosque came to
18 observe Justin's interactions with whom we know now to be
19 the undercover operative. And in a respectful way that
20 would not jeopardize the identity or integrity of this
21 investigation, we agreed at this juncture to refer to the
22 operative as UC-1.

23 THE COURT: Use the plural of operative UC-1,
24 maybe UC-1, UC-2.

25 MR. La PINTA: Right, so the court is aware, the

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1 only operative that Justin dealt with face-to-face at the
2 mosque was UC-1.

3 THE COURT: Oh, that's fine.

4 MR. La PINTA: The second operative was introduced
5 to Justin by UC-1 who is UC-2, and those interactions were
6 strictly via e-mail and internet.

7 THE COURT: All right.

8 MR. La PINTA: Presumably UC-2 was located in
9 Yemen, presumably. With your permission, we'll move
10 forward.

11 THE COURT: With my permission.

12 MR. La PINTA: We'll move forward, with that
13 understanding.

14 THE COURT: Okay.

15 BY MR. La PINTA:

16 Q Mr. Hito, in the course of your the experiences at the
17 mosque after you met Justin, did you have an occasion to
18 witness Justin's interactions with UC-1?

19 A Yes.

20 Q By the way, in a general way would you describe the age
21 of UC-1?

22 A It was hard to tell, but mid to do late twenties.

23 Q Okay.

24 Would you agree that he was of mid-eastern decent?

25 A Yes.

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1 Q Okay.

2 What did you observe regarding Justin is dealings
3 with UC-1, tell the court what you saw?

4 A What I noticed was that their interactions were removed
5 from the mosque. It was generally in private. They would
6 go out alone into the adjacent properties or across the
7 street or down the street or around the block.

8 Q And would you say that you observed Justin and UC-1 on
9 numerous occasions?

10 A Yes.

11 Q Okay.

12 What role did you UC-1 have at the mosque? What
13 did you see UC-1 do in general?

14 A UC-1, he was a new comer himself, so Justin had been at
15 the mosque for a while before this individual came. He was
16 actually not from our community.

17 Q Was UC-1 from any particular geographical area?

18 A From what I understood, he was from Brooklyn.

19 Q Did he commute on a regular basis from Brooklyn to Bay
20 Shore on a regular basis to attend mosque activities?

21 A Yes.

22 Q As Justin was socializing more with other members of
23 the mosque and UC-1, did he ever speak about other friends
24 that he had in the past?

25 A No, and it was kind of peculiar, because when he came

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1 in, there was no mention of any old friends or anybody from
2 the past. It was just this is my community now. The past
3 was either nonexistent, there were either no friends, or had
4 been forgotten, I'm not sure.

5 Q Okay.

6 Did you know, excuse me, a mosque member at that
7 time from 2011 to say 2013 by the name of Marcos Zea?

8 A Yes, I did.

9 Q M-a-r-c-o-s, Z-e-a?

10 A Yes.

11 Q How old was Marcos Zea during that time period?

12 A I assumed that he was slightly younger than me, because
13 we attended the same college.

14 Q So you knew him outside of the mosque?

15 A I recognized him in the mosque and when I saw him in
16 college, but I never interacted with him in college.

17 Q But you did interact with him at the mosque?

18 A Yes.

19 Q Would you say you spent a sufficient amount of time
20 with Marcos Zea to feel comfortable knowing the type of
21 person that he was?

22 A Yes.

23 Q Describe to Judge Hurley what you know about Marcos
24 Zea?

25 A He was intimidating, and I think that he threw around

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1 an air and weight of ultra conservatism to either impress or
2 attract people.

3 Q Okay.

4 Would you compare, please, your knowledge and
5 understanding of the type of person you knew Justin to be
6 compared to the type of person that you knew Marcos Zea to
7 be?

8 A Justin was a sweet, shy boy, and Marcos was arrogant
9 and brash and inflammatory.

10 Q Mr. Hito, are you aware that Marcos Zea was
11 subsequently arrested by the federal authorities and charged
12 with various terrorism crimes?

13 A Yes, I do.

14 Q Would you agree that Marcos Zea was approximately ten
15 years older than Justin at that time or now, even around?

16 A Yes, I mean, I knew he was a little bit younger than
17 me, so.

18 Q It would be about eight to ten years?

19 A Yes, something like that.

20 Q Did UC-1 ever give lectures at the mosque?

21 A There were little circles where guys would get together
22 and talk. Some people would present certain topics. And I
23 think he kind of pushed himself into a situation where he
24 had that platform and he wanted to present topics, and I
25 guess there was allowance for him to do so. But he was

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1 never given a position, but just within a little circle,
2 study circle, he would present topics. That's how I knew
3 what he was doing.

4 Q Did you ever see Justin socialize with UC-1 and Zea,
5 just the three of them?

6 A It happened in private. I remember I was helping out
7 with security for a prayer program and requested some guys
8 to -- I needed help for parking, and UC-1 would either take
9 one or the other, or perhaps both, into separate company,
10 you know.

11 Q Did you come to observe, after Justin entered the
12 mosque, and after his the dealings with or introduction to
13 UC-1 and Marcos Zea, did you notice anything particular
14 about the subject matter and particular language that Justin
15 would use when speaking to you and other members of the
16 mosque?

17 A Yes. So I knew Justin from the get-go, and I
18 understood his own demeanor, and I noticed later on he would
19 kind of parrot things that weren't inherent in his own
20 vocabulary, kind of posing, so to speak.

21 Q Sorry?

22 A Kind of posing.

23 Q Posing?

24 A Mimicking the kind of lingo they would use to be part
25 and parcel.

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1 Q Could you give us an example in terms of explaining
2 what you mean by that?

3 A One of the things I noticed, and I wasn't privy to this
4 after all was said and done, and I read in a newspaper about
5 the case, and I recall Justin saying something about, you
6 know, the Yemen operation and American puppets and so on,
7 and that just struck me as kind of copy and paste, not
8 something that was organically conjured by Justin in his own
9 thought.

10 Q Of course this is your own opinion, and you never had
11 an opportunity to ask particular questions as to whether in
12 fact it is of a parroting nature or not, correct?

13 A Right.

14 Q Okay.

15 Let me direct your attention now to the fall of
16 2013.

17 Would you agree that it was approximately two
18 years or so after Justin was first introduced to the mosque?

19 A Yes, around there.

20 Q And regarding your observations of Justin in the fall
21 of 2013, how would you describe your observations of him?
22 What was his demeanor like then?

23 A He was livelier, more jovial, happier, kind of more
24 interactive, I guess you would say.

25 Q Did he appear to be depressed in any way?

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1 A I mean, my interaction at the mosque, of course I
2 didn't see as much of him, but from what I saw things got
3 progressively more social. From day one to the last time I
4 saw him, it was pretty wide spectrum of where he was and
5 where he went socially.

6 Q Would you categorize it as all positive developments
7 regarding his socialization with people in terms of what you
8 observed?

9 A Apparently, yes, absolutely.

10 Q In the course of the two-year period that you knew
11 Justin at the mosque, how would you describe his demeanor in
12 general?

13 A Different.

14 Q More particularly regarding his attitude, was he mean
15 spirited, violent, antagonistic, or was he nice, respectful
16 and peaceful, or a combination of both?

17 A Very, very soft, gentle, and delicate.

18 Q Did you ever hear him espouse views of violence to
19 people?

20 A No. All of his activities involved in the mosque were
21 very altruistic, charitable?

22 Q By the way, did you know as part of his activities at
23 the mosque did he often volunteer at homeless shelters to
24 feed homeless people?

25 A All of those types of activities would take place

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1 there, absolutely.

2 Q As a general function of the mosque, was there a
3 community service with what the members would do?

4 A Yes, absolutely.

5 Q Did you know Justin to voluntarily participate in those
6 community services tasks?

7 A Yes.

8 Q Mr. Hito, during your experience at the mosque -- and,
9 by the way, how long have you been affiliated with the
10 mosque?

11 A The mosque sits on the same property as where the
12 mosque was when it was first constructed. So since birth, I
13 would say my family has been attending.

14 Q Did you ever know of any terrorism discussions or
15 plotting or anything that could be construed as advancing
16 illegal activities regarding terrorist organizations?

17 A No. Actually it had a reputation of being liberal
18 amongst more conservative communities.

19 Q I believe you said it was the most populated mosque
20 attended, the mosque out on Long Island?

21 A At that time.

22 MR. La PINTA: One moment, please.

23 (Pause)

24 MR. La PINTA: I have nothing further. Thank you
25 you, Mr. Hito.

Hito - Cross/DuCharme

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1 THE COURT: Thank you, Mr. La Pinta.
2 Mr. DuCharme.

3 MR. DuCHARME: Thank you, your Honor.

4 CROSS-EXAMINATION

5 BY MR. DuCHARME:

6 Q Good morning, Mr. Hito.

7 A Good morning.

8 Q Just to clear something up in terms of your time frame.
9 On your direct I think you testified about some contact you
10 had with Mr. Kaliebe in the fall of 2013.

11 Do you recall that?

12 A It could have been late summer. The reason I'm saying
13 that is, I was remembering what he was wearing when I walked
14 into the mosque. He was kind of sitting alone and wearing a
15 very thin white gown no bigger than a T-shirt. That's what
16 I had remembered about my last interaction with him.

17 Q Could it have been much earlier than that?

18 A I don't know how much earlier it could be. This is
19 just trying to say what I remember. It could have been
20 earlier, could have been around that time. I don't know the
21 precise time. I mean, I didn't know that it was going to be
22 the last time that I saw him, so I didn't make a particular
23 mental image. That's just what I remember that he was
24 wearing. It couldn't have been very cold, that's why I'm
25 saying it.

Hito - Cross/DuCharme

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1 Q Do you remember approximately when you first Mr.
2 Kaliebe?

3 A Yes, it was around age 16 or so.

4 Q I'm sorry?

5 A When he was about 16 or so.

6 Q Do you remember roughly month and year?

7 A Oh, no, I don't. I remember he was in the latter part
8 of high school, but he had different school situation, so I
9 couldn't really use that to gauge his the age.

10 Q You have some memory of at least some of the events of
11 his meeting you and joining the community at the mosque?

12 A Sure.

13 Q Do you have a similar recollection of when Marcos Zea
14 became involved in the community?

15 A I don't know where to compare the two. I think I
16 recall seeing Marcos prior. I don't know by how much time.

17 Q In any event, am I correct that both Mr. Kaliebe and
18 Mr. Zea became involved in the mosque community some period
19 of time before you saw UC-1?

20 A Yes.

21 Q Involved?

22 A Yes.

23 Q Was that in months, years, do you have any sense how
24 much before?

25 A Not really.

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1 Q No sense of whether it could be months as opposed to
2 weeks or days or years?

3 A No, he came as an attendee, and so there could have
4 been times that overlap, I wasn't there, he wasn't there, et
5 cetera.

6 Q When you say "he," who are you referring to?

7 A UC-1.

8 Q UC-1, okay.

9 Now, in your duties and responsibilities at the
10 mosque, you provide some religious training, right?

11 A Correct.

12 Q And you provide guidance to members of the community in
13 your capacity?

14 A Right, and to a limited extent, yes. I mean, teaching
15 people how to make their prayers and things like that, in
16 that capacity, you know.

17 Q I expected naturally under those circumstances
18 sometimes people come to you for advice?

19 A Yes.

20 Q Advice about interpreting religious obligations, for
21 example?

22 A Yes.

23 Q Or advice about how they could maybe put their thoughts
24 into action? For example, if there's a religious notion,
25 for example, that you should do good work in the community,

Hito - Cross/DuCharme

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1 you accept that obligation and go out there and try to put
2 that in your practice?

3 A Sure.

4 Q Ideally?

5 A Sure.

6 Q And do you know how many Muslims practice their faith
7 in the United States, do you have any sense at all?

8 A Not that large of a number, you know, compared to --
9 there's really no way to gauge that, other than mosque
10 attendance.

11 Q Would you agree with me that whatever number of people
12 in the United States practice that faith, the number that
13 ultimately get involved in any type of violent extremism is
14 extremely small?

15 MR. La PINTA: Objection.

16 THE COURT: Overruled. I will hear it.

17 A I never really looked at numbers or statistics. I
18 mean, my duties just pertain to our community and the youth
19 in our community. I can't really comment of what happens.

20 Q Surely you are aware that some who try to draw a link
21 between the practicing of a certain faith and violent
22 extremism, you are aware of those propositions, aren't you?

23 A Generally.

24 Q And in your experience, certainly at the mosque, you
25 have not seen an -- you haven't seen a real relationship

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1 between the practice of your faith and any violent extremist
2 behavior, I assume?

3 A No.

4 Q You practice peacefully, right?

5 A Yes.

6 Q And so do the other members of your community?

7 A Yes.

8 Q Surely you are sensitive to the fact that some people
9 have tried to draw a connection between certain aspects of
10 the faith and notions of a radicalization towards violence,
11 you are aware, I assume?

12 A Can you repeat that.

13 Q Sure.

14 You are aware that there are certain people who
15 try to draw a connection between Islam and radicalization?

16 THE COURT: Sustained, sustained. Not approved
17 line of inquiry, plus this witness has not indicated he has
18 a requisite experience that would be of help to the court.

19 MR. DuCHARME: I will try to do it a different
20 way. Hopefully you will see where I'm going?

21 BY MR. DuCHARME:

22 Q Mr. Hito, if you had learned, back at the time that you
23 were the counseling Mr. Kaliebe, that he was pursuing an
24 interpretation of Islam that would make him feel compelled
25 to engage in fighting or violence, you would have faith in

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1 that seriously, wouldn't you?

2 MR. La PINTA: Objection.

3 THE COURT: I'm got sure where it's going. I will
4 take it subject to connection under 104(b).

5 MR. DuCHARME: Thank you, your Honor.

6 THE COURT: I don't want to spend too much time,
7 but go ahead.

8 A We were always instructed in our mosque if there was
9 anything suspicious, report it to the authorities of the
10 mosque and the authorities of the law, you know, and that
11 was a very strict outline. You see something, say
12 something.

13 Q Okay.

14 In this instance you didn't see any indication
15 from Mr. Kaliebe that he was headed down a path towards
16 violence?

17 A So my interaction with him, as I stated, was
18 preliminary. I got to know him. I got to see what he was
19 like. My activities and duties at the mosque dwindled, and
20 I became less involved in the mosque. So other members and
21 things kind of took over my duties, and I had lost touch not
22 merely just with Justin, but more so with the community at
23 large.

24 Q Are you familiar with the concept of Jihad?

25 MR. La PINTA: Objection, your Honor.

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1 THE COURT: I will take it subject to connection.
2 Overruled.

3 A In what sense?

4 Q Well, I guess in the context of the Islamic studies
5 that you were participating in at the mosque?

6 A Never really came up.

7 Q No discussion of the concept of Jihad?

8 A No.

9 Q What about Hidgra --

10 I'm showing you what has been Government's
11 Exhibit 104 and ask you to take a look at that.

12 Can you see there's a screen actually next to you,
13 Mr. Hito. Can you see that okay?

14 A Yes.

15 Q Okay.

16 Do you recognize the individuals in that
17 photograph?

18 A Yes.

19 Q Okay.

20 Can you please just tell us who is in the
21 photograph?

22 A It appears to be Marcos on the left and Justin on the
23 right.

24 Q That's Marcos Zea, who you testified about earlier?

25 A Yes.

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1 Q Do you have any idea when that picture was taken?

2 A No.

3 Q Okay.

4 Now, you said you observed some interactions
5 between UC-1 and Mr. Kaliebe.

6 Do you recall the approximate time frame you
7 observed those interactions?

8 A Not in terms of year. I just remember that it was
9 during -- there was a Ramadan where there was a heightened
10 number of people who come and need help with parking. So it
11 was nighttime during Ramadan. I'm not really sure what year
12 that was or what month it corresponded to. The lunar
13 calendar shifts.

14 Q Okay.

15 Do you recall approximately how many times you saw
16 Mr. Kaliebe and UC-1 together?

17 A No, I don't know how many, maybe six times.

18 (Continued on the next page.)
19
20
21
22
23
24
25

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1 BY MR. DUCHARME:

2 Q How about Mr. Kaliebe and Mr. Zea?

3 A I really can't count coming in and out of the mosque,
4 and there are five prayers of the day, different events.
5 Can't put a number on them.

6 Q Did you participate or present for any conversations
7 between Mr. Kaliebe and UC-1?

8 A No, as I said, anytime I would see that, it would be
9 private.

10 Q And were there any conversations between Mr. Kaliebe
11 and Mr. Zea?

12 A I saw them sitting together and talking.

13 Q Is it fair to say you really didn't see what UC-1 and
14 Mr. Kaliebe were talking about during this time frame that
15 you testified about?

16 A I wasn't made privy what they were talking about
17 because they were secluded. The only thing I knew when he
18 would speak in a circle, he would present different
19 topics, but I really I can't say what they were speaking
20 about.

21 Q And did you provide any guidance to Mr. Kaliebe that
22 you think is relevant to his decision-making process
23 through this period that led up to his arrest. In other
24 words, did you have any conversations with him that you
25 think on reflection were relevant to his decision leading

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1 up to his arrest?

2 A I don't know what you mean.

3 Q For example, I think you talked, you commented a
4 little bit about a quote you saw in the press about
5 something he said that was going on in Yemen?

6 A Yes.

7 Q Do you recall any conversations with Mr. Kaliebe, for
8 example, about what was going on in Yemen?

9 A No.

10 Q Did you have any conversations with Mr. Kaliebe about
11 his thoughts or intentions with respect to traveling in
12 Yemen?

13 A No.

14 Q Did you have any conversations with Mr. Kaliebe about
15 the roles of any foreign groups such as Ansar al-Sharia or
16 Al Qaeda during this time?

17 A No.

18 Q Did he ever give you any indication that he was
19 interested in those groups or their positions?

20 A No.

21 Q And you have some medical experience, I believe your
22 testimony was on direct, but you are not offering, just so
23 I'm trying to understand you, you are not offering any
24 medical diagnosis with respect to Mr. Kaliebe today, are
25 you?

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1 A I'm not a physician.

2 MR. DUCHARME: Thank you very much, sir. No
3 further questions, your Honor.

4 THE COURT: Any redirect?

5 MR. LAPINTA: No, thank you.

6 (Witness excused.)

7 MR. LAPINTA: With the Court's permission and
8 patience, I'll try to get through these recordings. I
9 don't know how well the acoustics will be. I'm hopeful
10 that it is helpful to the Court and I apologize if it's
11 not.

12 THE COURT: Yes, sir.

13 MR. LAPINTA: Judge, this is how I plan to do
14 it. This recording was made on May 2, 2012, it's in my
15 memorandum, page 5. I'm offering this as far as the
16 relevance, as showing UC-1 is playing on Justin's obvious
17 need for friends and it goes to great length to develop a
18 close bond between them.

19 (Audio clip played.)

20 THE COURT: There's no transcript, I assume, of
21 this?

22 MR. LAPINTA: It's not too clear, is it?

23 THE COURT: It's somewhat difficult to
24 understand.

25 MR. LAPINTA: My concern, Judge, in all candor,

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1 I want to make as clear as a record as I can.

2 THE COURT: Yes.

3 MR. LAPINTA: I have no problem articulating in
4 the record the date of the recording and what the exact
5 language of it is. They have all these transcripts and
6 they can pose objections if I'm --

7 THE COURT: There are transcripts?

8 MR. LAPINTA: They have their own transcripts
9 and I've made my own. What I would like to do is, and
10 there are may be --

11 THE COURT: Is there any agreement as to
12 portions of the transcript?

13 MR. LAPINTA: They haven't posed any objections
14 to my latest submission where I outlined all this, so I
15 presume they will not object.

16 THE COURT: Well, the best evidence as far as
17 assisting the Court would be a transcript which I would
18 look at, even though that would not be the evidence per
19 se, but I would look at that in testifying to what I can
20 understand from the recording. Without a transcript, I'm
21 not sure it would be that helpful to me.

22 MR. LAPINTA: Okay.

23 THE COURT: Now, I would be prepared if it met
24 with the approval of the government and yourself, to
25 listen to the transcript in chambers at the conclusion of

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1 the hearing. I don't prefer to do that but I would do
2 that, but let's go back to the idea.

3 Is there an agreed upon transcript, again, with
4 the understanding that it will not necessarily exactly
5 mirror what is said on the recording?

6 MR. LAPINTA: Sure.

7 THE COURT: And it would not be the evidence but
8 it may be of assistance for me as the trier of fact to
9 understand what is being said on these records.

10 MR. LAPINTA: There is not an agreement,
11 however, I will endeavor to meet with the government, I'll
12 share with them my proposed transcript, they will share
13 with me their proposed transcript regarding their
14 recordings, and perhaps then we can print it out and have
15 a stipulation as to the accuracy of it, and we can then
16 use it as a court exhibit so if there is any further
17 review of these proceedings there is something that is
18 tangible and readable.

19 THE COURT: That presupposes though that the
20 parties will agree as to what precisely was said during
21 these recorded conversations which you might be able to
22 agree on portions, and then on portions if there is no
23 agreement, we'd have to have an audibility hearing to be
24 made to the Court, in other words, sufficiently
25 intelligible, so I understand.

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1 MR. LAPINTA: All right.

2 THE COURT: But just playing the recording will
3 not help at this point.

4 MR. LAPINTA: That's fine.

5 So we'll scrap the idea of both parties playing
6 recordings today and we'll go forward with our testimony.

7 MR. CANTY: Your Honor, with respect to the
8 government's recording, we have transcripts that are
9 attached to the recordings. If counsel would like to
10 provide us with those transcripts for the recording that
11 he's interested in recording --

12 MR. LAPINTA: I did --

13 THE COURT: I can only listen to one person at a
14 time.

15 MR. CANTY: I understand counsel is referring to
16 his written submissions to the Court as part of a
17 sentencing submission, but we've actually put a transcript
18 that runs simultaneous to the recording. If there are
19 word-for-word transcripts with respect to, I believe, he
20 wants to play 20 different recordings, we're happy to look
21 at those and listen to them and compare. And if a copy of
22 those are available, we'll provide them to the Court.

23 THE COURT: I think what we should do at this
24 point, we'll defer on the recordings. We can discuss it
25 later.

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1 As I understand it there is a physician here
2 prepared to testify?

3 MR. CANTY: Yes.

4 THE COURT: Why don't we proceed with live
5 testimony and we'll proceed with the question how to best
6 resolve the question of the recordings and what was said
7 on the recordings.

8 MR. LAPINTA: That would be true for both
9 parties' recordings, correct.

10 THE COURT: To the extent you agree, the
11 government has transcripts they are prepared to offer. To
12 the extent you agree with those transcripts, fine. To the
13 extent there is any areas of disagreement, I'll be
14 prepared to listen to the recordings. I'll be prepared to
15 indicate whether they are sufficiently audible so they are
16 intelligible to the trier of fact.

17 MR. LAPINTA: I was given their videos and
18 transcripts yesterday.

19 THE COURT: Yes.

20 MR. LAPINTA: I want to make this clear for the
21 record.

22 THE COURT: This is not by way of a criticism at
23 all.

24 MR. LAPINTA: Not at all. I'm not accepting it
25 as a criticism. I want you to understand, they gave me

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1 these documents regarding the transcript yesterday. I
2 gave them my transcripts February 16, 2015. I'll ask the
3 Court not to listen to any of these transcripts and
4 recordings today because I want to have an opportunity to
5 look at theirs just as well as they wish to look at mine.

6 MR. CANTY: Your Honor, for example, the first
7 recording we have here is not even the first recording
8 mentioned in the submission. For example --

9 THE COURT: You say "we have here." What are
10 you referring to?

11 MR. CANTY: Defense counsel provided a
12 submission what he purports to be transcripts of
13 recordings.

14 THE COURT: Yes.

15 MR. CANTY: His first one today is May 2, 2012.
16 That's not the first one listed in his submission. We're
17 asking for and we've provided recordings, and as they are
18 playing, the transcript, the words are appearing on the
19 video. That runs simultaneous to the individuals that are
20 speaking. We've listened to them. We've provided them to
21 defense counsel.

22 I'm happy to review any transcripts he wants to
23 provide, a list of 20 different transcripts that
24 correspond to the recordings he wishes to play today.
25 That's not what we have in the submission.

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1 We know the very first call is not in order.
2 Instead of jumping around, we're happy to listen to them.
3 We believe it is appropriate for us to play specific audio
4 and video recordings when we call our witness today,
5 hopefully before the end of the day.

6 We're not objecting to the Court listening to
7 these recordings, but it is clear to the government the
8 Court is having difficult understanding what is being
9 said, as the government is. These recordings are just
10 being played in open court with nothing to follow along
11 with in an intelligent fashion, 20 different recordings in
12 a row.

13 We're not submitting what is kind of put
14 together piecemeal in the submission is inaccurate. We
15 would like to see it in a organized fashion so we can make
16 that comparison.

17 MR. LAPINTA: And likewise I would like to have
18 the opportunity to review their transcripts more in depth.
19 I think that is fair.

20 THE COURT: At this point we'll have a written
21 transcript to lay a foundation and he will indicate where
22 he was and so forth. He will be asked whether in fact the
23 transcript that is being proffered is an accurate
24 recitation of what transpired on a particular day.

25 If the foundation is laid he can so testify, and

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1 presumably he will. To the extent that the defense feels
2 any portions are inaccurate, they have a right to pursue
3 that on cross-examination. They also have a right to
4 present an alternate transcript as to the disputed
5 portions of the conversation, but that is basically where
6 we are.

7 I don't know what the witness will be able to
8 say, that the transcript is accurate or not. I don't
9 know.

10 MR. LAPINTA: Well, I'll presume it is because
11 it's their --

12 THE COURT: Well the participants to the
13 conversation or the participant as the case may be as far
14 as testimony is concerned, that is the predicate I need to
15 evaluate the transcript. And as we've said, and this is
16 axiomatic, the transcript in and of itself is not
17 evidence.

18 What I hear as the trier of fact on the tape is
19 evidence, but I am permitted, assuming a proper foundation
20 has been laid, which the government seems to indicate they
21 can lay, to consider the transcript in trying to
22 understand the recorded conversation. So I'll not
23 preclude them from calling a witness and endeavoring to
24 successfully or otherwise, to have the Court consider the
25 transcript as an aid.

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1 So I think what we ought to do at this point,
2 and I'll hear you, Mr. LaPinta, fully on this, you know
3 that, I think what we ought to do is move ahead. We have
4 a live witness and we should conduct that portion of the
5 hearing at this point.

6 MR. LAPINTA: I agree.

7 The defense calls Dr. Alexander Bardey.

8 THE COURT: Good morning, sir. You will come up
9 right there.

10 If you can remain standing for a moment. Raise
11 your right hand.

12 **A L E X A N D E R B A R D E Y,**

13 called as a witness, having been first
14 duly sworn, was examined and testified
15 as follows:

16 THE COURT: If you will be seated.

17 State your first and last name and spell your
18 last name for the court reporter.

19 THE WITNESS: Alexander B-A-R-D-E-Y.

20 THE COURT: Mr. LaPinta.

21 MR. LAPINTA: Yes, your Honor. I'll start.

22 I'll need, and perhaps it will be the perfect time to take
23 our morning break, I wasn't anticipating in the fashion I
24 did. I need some time to organize my medical records and
25 that will correspond with our afternoon break. I'll

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1 probably go 15 or 20 minutes.

2 THE COURT: We'll recess until 11:30 and then
3 we'll proceed with the direct examination.

4 MR. LAPINTA: Thank you for your patience, your
5 Honor. Thank you.

6 THE COURT: Thank you, sir.

7 You may step down, and we'll see you on the
8 stand in 20 minutes.

9 THE WITNESS: Very well. Thank you.

10 MR. LAPINTA: Thank you once again, your Honor.
11 I apologize for the logistical problems.

12 THE COURT: No apologies necessary. We'll
13 reassess this situation with respect to the transcripts
14 and so forth. We'll go over the ground rules once the
15 doctor's testimony is concluded.

16 DIRECT-EXAMINATION

17 BY MR. LAPINTA:

18 Q Dr. Bardey, what do you do for a living, sir?

19 A I'm a forensic psychiatrist.

20 Q By whom are you employed?

21 A I work for myself. I also have contract work with
22 the Nassau County Department of Mental Health, as well as
23 the Center for Court Innovation.

24 Q We'll go through your various appointments in a
25 moment.

Bardey - Direct/LaPinta

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1 Explain your educational background to Judge
2 Hurley.

3 A After graduating from Harvard with a Bachelor's In
4 Biology, I attended medical school in SUNY Stoney Brook.

5 After completing medical school I did a
6 four-year residency in psychiatry at NYU medical center,
7 and I finished that in 1992.

8 Q What licenses and certifications do you have, sir?

9 A I have a valid medical license in the state of New
10 York and I am board certified in general psychiatry and
11 board certified in forensic psychiatry.

12 Q What are your professional appointments?

13 A I have a faculty position at NYU School of Medicine
14 and a faculty appointment as the New York Medical College
15 up in Valhalla.

16 Q Previous to those appointments, did you have others?

17 A No.

18 Q Were you once a senior psychiatric consultant for the
19 Brooklyn Mental Health Court?

20 A Those are more employment positions rather than
21 faculty appointments, but yes, I had worked for the Mental
22 Health Court in Brooklyn and I just began to do
23 consultations with them again.

24 I also worked, after I finished my residency at
25 NYU, I remained at Bellevue which is one of the teaching

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1 hospitals at NYU, initially in the psychiatric emergency
2 room, then on the consultation liaison service which is a
3 joint medical and psychiatric service where I provided
4 psychiatric consultations to medical patients.

5 After that I took a position in the forensic
6 psychiatry service at Bellevue which is an inpatient
7 psychiatric unit jointly run by the hospital and the New
8 York City Department of Corrections where we treat and
9 evaluate individuals referred from the New York City jail
10 system for treatment and court ordered evaluations. I
11 eventually became the deputy director of that service and
12 remained there for approximately nine years.

13 After that, I became the director of the
14 Kendra's law program in New York which is a civil
15 outpatient commitment program. I did that for two years,
16 and then I became the director of mental health services
17 at Rikers Island where I remained also for about two
18 years.

19 Since 2003, I've been working mostly on my own
20 in my own private practice which is divided between a
21 private treatment practice and a private forensic
22 practice.

23 Q Did you author any publications or participate in any
24 editorships?

25 A Sure. I published several articles specifically in

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1 the area of telepsychiatry, informed consent,
2 dangerousness, malingering, malpractice.

3 Q Have you testified as an expert witness in various
4 courts in New York State?

5 A In New York State, sure.

6 I've been qualified as an expert in Supreme
7 Court in various counties in New York state. Specifically
8 in Suffolk, in Nassau, in Queens, in Kings, Richmond, the
9 Bronx, Manhattan, Ulster, Greene.

10 I've been qualified as an expert in courts in
11 Massachusetts, Pennsylvania, Connecticut. I've also been
12 qualified as an expert in both Eastern and Southern
13 Districts in federal court.

14 MR. LAPINTA: Okay.

15 Your Honor, based upon Dr. Bardey's education,
16 work experience, training, etcetera, I move now to qualify
17 him as an expert in the field of forensic psychiatry.

18 MR. CANTY: No objection, Judge.

19 THE COURT: All right. He is so qualified.

20 THE WITNESS: Thank you.

21 Q Dr. Bardey, in the course of your employment as a
22 forensic psychiatrist, have you been hired by both the
23 defense and prosecution regarding your evaluation of
24 defendants in criminal cases?

25 A Yes, I have.

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1 Q And if you could for the Court, is there a way of
2 explaining what proportion of hires do you have regarding
3 defense versus prosecution?

4 A In my estimation, I probably do probably 60 to
5 70 percent defense work, and the balance would be work for
6 the prosecution.

7 Q And they would be various prosecutors' offices in
8 this region; is that correct?

9 A Yes, U.S. Attorney's Office, Attorney General's
10 Office, all around the New York area.

11 Q And in 2013, Dr. Bardey, were you employed to conduct
12 a comprehensive psychiatric examination of Mr. Justin
13 Kaliebe?

14 A I was, yes.

15 Q And isn't it true that I had asked you and hired you
16 to do so?

17 A You did.

18 Q Okay. And you are being paid for your services here
19 today?

20 A Yes.

21 Q In fact, the United States Government is paying for
22 your hourly rate; is that right?

23 A Correct.

24 Q That's upon application by myself to the Court,
25 correct?

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1 A It was.

2 Q Would you explain what sources of information from an
3 introductory point of view, did you look to to begin your
4 evaluation of Mr. Kaliebe?

5 A In Mr. Kaliebe's case, which was no different than
6 any other forensic evaluation that I do, I tried to obtain
7 as much relevant collateral information as I could, and in
8 this particular case, it took the form of, I believe,
9 something like 23 different sources of information. Some
10 of them were legal documents, descriptions of the offense,
11 or other legal papers.

12 A number of them were medical records dating
13 back to when Mr. Kaliebe was six years old and at
14 different intervals since then. I also reviewed school
15 records that spanned the years that Mr. Kaliebe was in
16 school from elementary school through high school and
17 BOCES.

18 I also reviewed a number of letters or
19 consultations written by different physicians over time.

20 I also conducted a collateral interview of both
21 his mother and sister.

22 Q Okay. And as far as defining a goal that is relative
23 to your hire, what were your goals?

24 A My goal was to perform a comprehensive evaluation so
25 as to assist the Court in getting a clearer understanding

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1 of his mental state at the time of the offense, and of any
2 psychological or psychiatric factors that may be relevant
3 for sentencing purposes.

4 Q Regarding the medical records that you've explained,
5 were you provided with all of those records?

6 A I was.

7 Q And regarding the meetings that you had with various
8 people, you scheduled them yourself?

9 A I did.

10 Q Regarding your interviews with Mr. Kaliebe, you met
11 with him at various correctional facilities where he's
12 housed, correct?

13 A Correct.

14 Q For the sake of expediency, yesterday there were two
15 family witnesses, Mr. Kaliebe's mother, Deborah Livoti and
16 his sister, Ms. Kaliebe.

17 For the sake of expediency regarding facts that
18 were presented to the Court, I'll list to you relevant
19 facts that were explained in court yesterday and then ask
20 you whether those facts are consistent with what you
21 learned or whether there are other facts you feel are
22 relevant and important. Okay?

23 A Okay.

24 Q Yesterday, there was testimony that Justin was born
25 with various physical ailments, including a clavicle

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1 dislocation, undescended testicles, a micropenis. He had
2 developmental delays as an infant regarding crawling,
3 walking, talking.

4 He had bad eye contact as an infant, as a
5 toddler and as an adolescent. There has been testimony
6 that he continues to have bad eye contact as an adult. He
7 has a history of staring at the ceiling. He has severe
8 vision problems that require corrective lenses in the form
9 of glasses.

10 He has had muscle deformity at birth continuing
11 throughout his life. He has exhibited clear signs of
12 uncoordination and problems with his motor skills.

13 He had a defined apparent speech impediment that
14 some have described as garbled, which required therapeutic
15 intervention at the age of five years old. He was
16 diagnosed as having a reverse tongue thrust.

17 He skipped entry into kindergarten because he
18 was not ready for that program. He was left back in the
19 second grade.

20 He was given an individualized education program
21 upon his entry into the public school system.

22 He walked with an abnormal gait. He didn't
23 associate well with other children.

24 He's been described in testimony here as "the
25 weird kid."

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1 He spent most of his time outside of school
2 alone in his bedroom, not associating with anyone.

3 He had few friends. He suffered from bad
4 hygiene.

5 He had bladder and urine control problems up to
6 the age of 16. He had stooling issues regarding the
7 control of his bowel movements.

8 At age 13 or 14 he was diagnosed with Kallmann
9 syndrome. That's a syndrome that is explained as the
10 human body's inability to engage in puberty and the
11 delivery of the hormone testosterone to the body.

12 He was diagnosed as having a learning disability
13 by the director of Good Samaritan Pediatric Neurological
14 Bureau.

15 He was diagnosed, in the opinion of his treating
16 pediatrician, as having being on the autism spectrum and
17 having Asperger's syndrome.

18 There's also testimony regarding family
19 circumstances that were discussed at length here,
20 including that his parents divorced at the age of six,
21 that his father was verbally abusive and at times
22 exhibited violent behavior when he was a child, that his
23 grandmother was not accepting of him, and in the opinion
24 of lay witnesses, she suffers from mental illness.

25 The father, Mr. Robert Kaliebe, rarely appeared

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1 for his scheduled visitation --

2 MR. CANTY: Judge, I don't know if there is a
3 question in the future, but is the purpose of this to
4 inform the Court what this doctor reviewed because a lot
5 of this material was reviewed by the doctor, we certainly
6 would agree to that, but he wasn't here for the testimony.

7 I don't know what the purpose of the listing of
8 the entire testimony yesterday will establish. I --

9 MR. LAPINTA: I'm doing this for expediency
10 purposes. I can take two hours and get this from him in a
11 testimonial. There is prior evidence of this on the
12 record, and I thought this would be an expeditious way to
13 expedite the time.

14 THE COURT: Didn't the doctor submit a record?

15 MR. LAPINTA: He has.

16 THE COURT: In that report, did he indicate the
17 materials that he has reviewed in framing his opinion?

18 MR. LAPINTA: He has.

19 THE COURT: Is there any way to short-circuit
20 the process by having him verify now that he's under oath,
21 these are the materials that he reviewed?

22 MR. LAPINTA: I'm happy to do that.

23 My goal is to make a record under the official
24 transcript here. I have no opposition to having his
25 report marked as a court exhibit. If you want to do that

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1 and we can go forward with that --

2 MR. CANTY: I have no objection at all. My
3 concern is he's relying on testimony yesterday, but
4 certainly that was not in existence when he created his
5 report.

6 If you want to move his report in, we have no
7 objection so we know specifically what he has.

8 THE COURT: Just because the issue has been
9 raised -- I'll withdraw that.

10 His report will be received into evidence. If
11 you want to underscore some portions of that as a
12 predicate to whatever you want to elicit from the doctor,
13 that is fine.

14 MR. LAPINTA: Very well.

15 THE COURT: Let's do that. That would be the
16 next defendant's exhibit. That would be Dr. Bardey's
17 report. And the date of that report is?

18 MR. LAPINTA: The date of the original report is
19 March 25, 2014. There was also an addendum to that report
20 that was completed on December 29, 2014. Both reports
21 were attached to my various sentencing submissions to the
22 Court and given.

23 THE COURT: And what is the next Defendant's
24 Exhibit? I?

25 So I-A will be the first report and the

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1 supplement to that report will be I-B. And they are
2 received into evidence on consent.

3 (Whereupon, Defendant's Exhibit I-A and I-B,
4 received in evidence.)

5 MR. LAPINTA: Thank you very much.

6 THE COURT: Yes, sir.

7 Q So, doctor, regarding your report that you completed
8 with Mr. Kaliebe, isn't it true that you did a
9 comprehensive evaluation of all of his prior medical
10 treatment?

11 A Yes.

12 Q Okay. And in addition, you did a detailed history of
13 various events that took place in his family and his
14 school, etcetera, correct?

15 A Yes. The report summarizes what -- the contents of
16 my examination which are consistent from one case to
17 another.

18 I reviewed the individual's entire life, going
19 over their developmental history, social history,
20 educational reports, history of relationships at work,
21 entanglement of the legal system, substance abuse. I
22 tried to explore every area of the individual's life and
23 then to focus on the moment of time that encompasses the
24 offense conduct. Then I take all of that information and
25 transposed it into a report.

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1 Q Would you please explain to the Court regarding
2 Mr. Kaliebe's past medical history, the most relevant and
3 important aspects of his prior treatment and diagnosis
4 that was most relevant to you?

5 A Sure. There were several.

6 Obviously from the day he was born, as you
7 mentioned earlier, he manifested a number of medical
8 problems of developmental delays, of learning problems.
9 As he got older, these problems evolved and ended up
10 causing more significant medical issues, including the
11 delay of puberty which led to various medical workups that
12 determined there were problems with his brain that was
13 causing his body not to produce testosterone and, thus,
14 potentially causing him to be infertile, with some
15 significant absence of sexual characteristics: The growth
16 of his penis, body hair, muscle tone, musculature in
17 general, physical strength and bone strength, all the
18 while suffering as well from a chaotic household which
19 then contributed to the development of a depressive
20 disorder which led to his being treated by psychologists
21 and psychiatrists and being prescribed antidepressant
22 medications as an adolescent.

23 Throughout all of this the medical record is
24 peppered with various comments that ultimately as he grew
25 older sort of gelled together to define an additional

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1 syndrome from which he suffered which is the Asperger's
2 disorder which is an autism spectrum disorder. So, by the
3 time I evaluated him, it was clear that he was manifesting
4 really three different and separate conditions which all
5 interacted. One was this medical condition, the
6 Kallmann's syndrome. One was the psychosocial trauma and
7 difficulty and chaos that caused the depression, and the
8 third was this developmental disorder taking the form of
9 Asperger's.

10 Q Okay. And in consideration in his various diagnoses
11 and treatment, was there a component of your investigation
12 that revealed that Justin Kaliebe as a child and
13 adolescent and a teenager had severe socialization issues?

14 A Sure. The medical records, as well as Mr. Kaliebe's
15 mother and sister and Mr. Kaliebe himself, all
16 consistently described having problems with social
17 communication and social relations which are one of the
18 two hallmark manifestations of Asperger's. Individuals
19 with Asperger's have a difficult time communicating with
20 other people, both in expressing what they want to say and
21 understanding. They have a difficulty reading people's
22 emotional states. They have a difficulty changing from
23 one set to another, in addition to having a very
24 restricted number of interests that they get intensely
25 involved with.

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1 It's this combination of social impairment and
2 limited interest that define the disorder, in addition to
3 a number of associated features such as bizarre speech,
4 incoordination, gait problems. Those are the main
5 associated features.

6 Q Okay. And once again regarding the facts and
7 treatment and diagnosis you have just explained, you feel
8 that they were all relevant factors in you coming and
9 reaching to the conclusions that you did here, correct?

10 A Yes, they were very significant building blocks on
11 which Mr. Kaliebe's mental state really rested from the
12 age of 16 and 17 on through his arrest.

13 Q So that we're clear, the real prime area target of
14 his actions evaluating his mental state was his conduct
15 regarding the offense charged, correct?

16 A Correct. It was to create for me and the Court an
17 understanding of what his mental state was at that moment
18 in time.

19 Q All right.

20 So regarding his history and what has been
21 reported to other healthcare providers in their
22 conclusions, would you agree that Mr. Kaliebe had a vast
23 number of different physical and psychological ailments
24 that were present during the time period where this
25 offensive conduct took place?

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1 A Absolutely. Also I said before, he has this
2 congenital medical problem, the Kallmann's syndrome, which
3 creates some physical as well as psychological issues.

4 He had this chaotic and traumatic childhood
5 which contributed to his depression and need for
6 antidepressant medication, and then he evolved the
7 manifest symptoms of his developmental disorder,
8 Asperger's, and the three really came together as I said
9 around the age of 15 or 16.

10 Q I believe you described when explaining Asperger's,
11 you explaining that the hallmark of an Asperger's
12 individual is certain fixations or obsessions to subject
13 matter?

14 A Absolutely. Individuals with Asperger's have a
15 normal intelligence, but uniquely and singularly they get
16 interested in usually fairly technical fields, whether it
17 is electronics, subways, locomotives or history, and
18 Mr. Kaliebe has just that kind of history. According to
19 him and to his mother and the medical records, he's had at
20 different times a fascination with a specific subject
21 matter and dived into it with a kind of zeal and intensity
22 that is really not matched with individuals who don't have
23 this disorder. They know absolutely everything about this
24 very narrow area of interest which alienates him from
25 everyone else. They also want to talk about. They are

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1 not interested in spending time doing anything else but
2 that particular subject matter.

3 Q Would you agree, based upon your evaluation and the
4 study of past records and conclusions by other medical
5 providers, that Mr. Kaliebe is of normal intelligence?

6 A Yes.

7 Q And more particularly, were you -- were you aware
8 that Mr. Kaliebe as a child and adolescent and teenager,
9 had in fact experienced obsessions with professional
10 wrestling, Harry Potter and dinosaurs? Do you recall
11 that?

12 A Yes, as well as I think the marines, post-World War
13 II history, and they did most recently at the time of his
14 arrest, the Islamic faith and everything to do with that.

15 Q In the course of your interviewing of various people
16 relevant to this evaluation, in particular, Mr. Kaliebe
17 and his family members, did you ever have a suspicion that
18 they were not forthcoming or they were misleading you in
19 any way?

20 A That is something I always consider. In any forensic
21 evaluation, there is a potential for an individual to want
22 to advocate strongly what they believe should be the
23 outcome of a case, so one has to consider whether they are
24 exaggerating, faking or what we call malingering, for a
25 specific purpose, usually to evade prosecution or to

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1 minimize ones culpability and responsibility for a crime.
2 It's something I always consider.

3 The way you test for it, the way you can make
4 sure that that is not the case, is by looking at various
5 sources of information and see if there is consistency.
6 In this case, there was a great deal of consistency
7 between what Mr. Kaliebe reported, what his family
8 reported, and what was in medical records that predated
9 his arrest. So that to me rose my index that this was
10 credible information that I was obtaining from all of
11 these parties.

12 Q Regarding the opinions from healthcare providers, is
13 it relevant to you that Mr. Kaliebe was involved in an
14 individual education program when attending public school?

15 A Sure. It gives you a sense of the level of
16 impairment that his problems caused him, because a
17 diagnosis is really only relevant if it causes a
18 functional impairment. In a child going to school and to
19 do well, would be one such measure. The fact that he
20 needed to be placed in Special Ed because of learning
21 problems, is an indication how severe his problems were at
22 the time.

23 Q Would his individualized education programs be
24 consistent with others that have suffered Asperger's
25 syndrome?

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1 A Sure. Not every Asperger's kid is the same. Some
2 might be able to go through school without such a problem,
3 and in Mr. Kaliebe's case, which I think it is kind of at
4 the center a little more complicated than other cases, he
5 has multiple problems.

6 If an individual only has one issue, Kallmann's
7 syndrome, depression, or Asperger's, then it is a much
8 easier path to look at, but when you are dealing with
9 multiple problems at the same time, it becomes harder to
10 pinpoint exactly what is going on.

11 There are multiple things at the same time in an
12 individual who is developing. Keep in mind, throughout
13 that period of time, from 6 to 17 to 18, some would argue
14 up to the age of 25, the individual is evolving, brain is
15 developing, and therefore they are changing. So you have
16 a moving target that has multiple problems. It becomes
17 harder to pinpoint a specific diagnosis.

18 (Continued.)
19
20
21
22
23
24
25

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1 BY MR. LA PINTA (Cont'd):

2 Q. In the course of your evaluation of all of
3 Justin Kaliebe's medical treatment, was there ever, prior
4 to your evaluation, comprehensive evaluation, was there
5 ever a prior comprehensive evaluation, similar to the one
6 you conducted here?

7 A. No.

8 Q. Is that relevant to you regarding certain findings
9 that may or may not have existed in those records?

10 A. Well, sure.

11 I mean, most other clinical evaluations, and,
12 quite frankly, when I do a clinical evaluation, in other
13 words, if someone comes to my office complaining of
14 anxiety or depression, I will do an evaluation, I will
15 come to a diagnostic conclusion.

16 But I'm not going to do the kind of record
17 review that I would do in a forensic case because in a
18 clinical evaluation you believe what the people tell you,
19 your patient or their family, and you base your decision
20 on what you are seeing. You don't do this kind of
21 in-depth review of all of the medical records, of all of
22 the school records, of interviewing various different
23 sources.

24 So it's rare to have this kind of large amount
25 of information. So it's not rare for a forensic

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1 evaluation to be the first time that such a comprehensive
2 look is taken of an individual.

3 Q. Would it be fair to say in review of all the medical
4 records that you conducted here, that only maybe one or
5 two treating physicians diagnosed Mr. Kaliebe with
6 Asperger Syndrome, is that fair to say?

7 A. It's fair to say.

8 Q. Would that be in part caused by the fact that there
9 was not as comprehensive an evaluation as you have
10 performed here?

11 A. I think so.

12 I also think that up until the age of 16 and 17
13 he was manifesting a lot of medical issues which tend to
14 take front stage compared to more psychological or
15 developmental issues.

16 So the fact that he was having issues with his
17 testosterone level, that he needed procedures for
18 different things, he needed MRIs and blood tests, I think
19 that took center stage.

20 And it's only once those issues got resolved
21 that some of these other developmental and behavioral
22 problems became the focus of treatment and attention.

23 Q. I'd like to direct your attention, Dr. Bardey, to the
24 segment of your evaluation when you met with Mr. Kaliebe.

25 Would you explain the manner in which you

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1 approached that evaluation in person with him?

2 A. Sure.

3 My evaluation of Mr. Kaliebe was consistent with
4 the way I would do any forensic evaluation in that after
5 appropriate introductions and explaining to him that I was
6 not going to treat him and that there was a good chance
7 that a report would be generated, I then reviewed his life
8 from birth until the present, going over his developmental
9 history, his educational here, his work history,
10 relationship history, psychiatric history, substance abuse
11 history, history of entanglements with the law, and then
12 focus on the instant offense and his account of that
13 behavior.

14 Q. And procedurally, you have this one-on-one meeting
15 and evaluation after you have obtained and reviewed all
16 prior medical records.

17 Correct?

18 A. Correct.

19 Q. And that's done on purpose to see whether there is
20 consistency with the records compared to what your subject
21 matter is saying.

22 Correct?

23 A. Sure.

24 Q. Now, did you make any initial observations of
25 Mr. Kaliebe when you first met with him that's relevant

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1 for Judge Hurley's determination in this case?

2 A. Yes.

3 Q. Please explain them.

4 A. Well, after my review of this information that I
5 discussed and my direct examination of Mr. Kaliebe, I came
6 to the conclusion that at the time of the offense that he
7 was suffering from various medical and psychiatric
8 disorders.

9 Q. Would you explain how you found him in terms of his
10 demeanor.

11 A. Sure.

12 Mr. Kaliebe presented as -- he wasn't
13 particularly well groomed, he didn't make very good eye
14 contact. He was poorly related interpersonally, meaning
15 that there wasn't that usual back and forth reciprocity
16 and connection that you would have with someone who's not
17 afflicted with some kind of condition.

18 There was no issues with the quality of his
19 thinking. There was no issues with his intelligence. He
20 was alert. He was oriented. There was no evidence that
21 he was having any kind of psychotic symptoms or manic
22 symptoms.

23 His speech was sometimes a little stilted, and
24 he seemed intent sometimes on staying on a certain topic,
25 having a harder time moving around from one subject to

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1 another.

2 That was really the sum of the -- his
3 presentation.

4 Q. Were you aware whether Mr. Kaliebe had ever been
5 previously arrested before these charges?

6 A. Having reviewed his arrest record, there was no
7 indication that he had ever been arrested before.

8 Q. Would you comment on how you found him to be
9 personality wise in terms of his demeanor in general to
10 people, or you, I should say?

11 A. Yeah.

12 I mean, as I said, he didn't make very good eye
13 contact, he wasn't very well related. He wasn't picking
14 up on the usual cues that someone would during a normal
15 conversation.

16 He felt a little bit distant in the sense of
17 being disconnected.

18 Q. Was he friendly at the same time?

19 A. Oh, sure.

20 He wasn't antagonistic or hostile or paranoid or
21 guarded or angry. He was forthcoming and polite and
22 interacted as best he could.

23 Q. Would you say he was more passive or more aggressive
24 in how he presented himself and described his history?

25 A. I would describe him as more passive.

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1 Q. In speaking to him about various subject matters, did
2 you focus in at all as to whether Mr. Kaliebe was a
3 thoughtful, compassionate person at all?

4 A. Well, he gave examples in his life of having been
5 compassionate, and rather than compassionate, I would seem
6 more that he had a sense of justice and injustice.

7 He felt, you know -- he had given examples of
8 being parts of various youth programs related to the
9 police, where he -- programs that he quit because he felt
10 things were not being done fairly and felt that injustices
11 had been done.

12 I also believe at some point he stood up to
13 various bullies that were bothering some other
14 schoolmates. There were examples in his history where he
15 had felt strongly about various injustice and done
16 something about it.

17 Q. I believe you had previously explained that his lack
18 of socialization was a very relevant factor in your
19 evaluation.

20 Is that right?

21 A. Yes.

22 Q. Do you know of any particular events that took place
23 during Mr. Kaliebe's childhood that would affect his
24 ability to be social with others?

25 A. Well, there were many. You know, some external and

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1 some internal and I'll explain what I mean.

2 Internally, the fact that he spent his youth
3 going to various doctors and getting treated and getting
4 prodded and scanned, the fact that he had difficulty with
5 puberty, he lacked facial hair, the micropenis, the lack
6 of secondary sexual characteristics, the fact that he had
7 suffered from depression from his difficult childhood.

8 And then there were certain external events that
9 had occurred in his life. He had witnessed his
10 grandfather die in front of him. He had very few friends
11 growing up and one of his friends consumed New Year's Eve,
12 I believe, too much alcohol and froze to death.

13 At one point he was the victim of a home
14 invasion which traumatized him emotionally. On an ongoing
15 basis early on, especially, he witnessed a great deal of
16 verbal and physical abuse at the hands of his biological
17 father initially towards his mother, but then later
18 towards his sister and later towards his stepmother, his
19 father's new girlfriend or wife.

20 So all of these really served to further
21 alienate him from others and negativity impacted on his
22 socialization which piggybacked on his, in my opinion,
23 impairments in that area due to his Asperger.

24 Q. Do you feel that his relationship or lack thereof
25 with his father, Robert Kaliebe, was a factor in terms of

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1 understanding his socialization skills?

2 A. Well, his father, he reported to me as did his family
3 was a very chaotic, a man who suffered from substance use
4 problems and behavioral problems, really could not keep a
5 steady home.

6 Yet, Mr. Kaliebe was very attached to him and
7 wanted a paternal figure. The absence of that, I think,
8 created a vacuum in his life, certainly an emotional and
9 psychological vacuum that he wanted to fill at some point.

10 Q. Did you come to learn, Dr. Bardey, that there was a
11 period in time when Justin decided to leave his residence
12 with his mother and stepfather in Babylon and move to his
13 father's residence where he lived with his father's
14 parents?

15 A. Yes.

16 I believe around the age of 15 or so he moved to
17 Brentwood to live with his father and his father's new
18 family.

19 Q. Are you aware of what precipitated that or caused
20 that?

21 A. His mother -- I think his grandmother had thrown him
22 out of the house a number of times, I think five times
23 around that period of time.

24 He also wasn't doing well in the Babylon school
25 program, didn't have any friends. His grades were poor,

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1 and he felt that the people around Brentwood maybe were
2 more to his liking, that he might be able to do better
3 there.

4 Q. Did his relationship with his stepfather have
5 anything to do with his decision to move out of Babylon
6 and move to Brentwood?

7 A. Yes.

8 He did not get along well with his stepfather.
9 In fact, they argued and fought I think even physically on
10 some occasions, although my understanding is the police
11 was never called.

12 So he had difficult relationships with his
13 stepfather, with his grandmother, with a number of people
14 that caused a lot of inconsistencies where he lived and
15 who was raising him.

16 Q. At or about this time, when Justin moved from Babylon
17 to Brentwood, did you come to learn that he was studying a
18 particular class of social studies in high school?

19 A. Yes.

20 He was studying Islamic history, specifically I
21 think Seventh Century Islamic history which piqued his
22 interest and got him to start reading more books and
23 internet articles and journals on that topic and very
24 rapidly the study of Islam became one of those narrow
25 fields of intense interest for him.

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1 Q. Similar to that in the past with wrestling, Harry
2 Potter, dinosaurs and I believe you said the army?

3 A. Yes, similar but also I think different because in
4 this case there were actually people that he could connect
5 with that shared that interest, which I think created kind
6 of a positive feedback loop for him that got him more and
7 more involved in that particular field.

8 Q. Did his reading of the autobiography of Malcolm X
9 have anything to do with his interest in Islam?

10 A. It did.

11 In my opinion it did for a very specific reason,
12 which is that Mr. Kaliebe identified with Malcolm X as
13 someone who felt like an outsider, someone who had a lot
14 of obstacles put in front of him, somebody who was
15 struggling for injustices.

16 And I think it personalized the religion for
17 him. It made it something he could connect with and
18 somehow it seemed to make sense given his own struggles
19 with his medical problems, with his social problems, with
20 his family problems, with his school problems.

21 He suddenly found a place where he could
22 identify and share these problems with.

23 Q. Would you agree that his studies of Islam and
24 Malcolm X helped him focus himself and give him direction
25 in how to deal with the various problems that you have

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1 explained?

2 A. Absolutely.

3 I mean, I think what's striking, and this is in
4 some of the medical records, is that, you know, in the
5 spring of 2011, Mr. Kaliebe was depressed, and that's when
6 he's prescribed various antidepressant by a Dr. Ujitari, I
7 think his name is.

8 But when he moves to Brentwood and is able to
9 connect with other people of that faith and explore
10 similar interests, his mood really brightens to the point
11 where he stops taking antidepressants and his family
12 reports that he's a much happier and a much less depressed
13 individual.

14 Q. Would you explain that physical orientation as being
15 social acceptance by others?

16 A. Absolutely.

17 I think what his interest in Islam did when he
18 met a group of people in Brentwood was just that.
19 Normally his very idiosyncratic and specific interests in
20 a field was kind of alienating. Other people were not
21 interested in talking about dinosaurs or wrestling
22 figures.

23 But now he had a group of people that was
24 equally interested where his interest generated
25 conversation, social contact, social acceptance. In some

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1 of the older members of that group he even found father
2 figures that replaced -- that filled that vacuum that I
3 was talking about.

4 And he was suddenly someone with a certain level
5 of expertise, someone who was respected and that, I think,
6 did a lot of his self-esteem and improved his demeanor.

7 Q. When you met with Mr. Kaliebe, did he explain to you
8 that he was interested in the Muslim religions for its
9 spiritual aspects?

10 A. That's what got him into it, yes.

11 Q. Initially?

12 A. Initially.

13 Q. And it was the spiritual aspect of the religion that
14 made him cope better with his various conditions and
15 stressors in his life.

16 Is that fair to say?

17 A. Yes.

18 And the way he put it was whereas up to now he
19 felt his life had been one of multiple struggles, but
20 understanding these struggles as something that God would
21 put on him to sort of test him and to see what he could
22 do, it give his life a purpose, it helped him a great deal
23 cope with the issues of his life.

24 Q. Did you find that he could relate to the Muslim
25 religion because in his studies of the religion he found

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1 that Muslims were being oppressed in various parts of the
2 world?

3 A. Right.

4 His interest initially was in this notion of
5 land being taken away from Muslims and that a legitimate
6 war was being waged to get that land back.

7 And that's somehow how he identified with that
8 concept of an oppressed people.

9 Q. During the course of your personal meetings with
10 Justin and your evaluation of him, did you talk about holy
11 war and his intrigue and interest in participating in holy
12 war?

13 A. Yes.

14 Q. In your assessment of Justin, did you ever feel or
15 believe that his desire to fight a holy war was
16 problematic in so far as targeting innocent victims or
17 participating in random acts of terrorism in an effort to
18 be against the United States or particular people?

19 MR. CANTY: Objection.

20 THE COURT: Sustained.

21 BY MR. LA PINTA:

22 Q. Would you comment on how Justin explained his
23 interest in holy war.

24 A. Sure.

25 I mean, he differentiated during my meeting

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1 terrorism -- terroristic acts such as 9/11, with what he
2 had in mind in terms of a holy war in the middle east.

3 His way in and his interest was in righting that
4 wrong, was in correcting a perceived injustice. It was
5 not the idea of harming innocent people or Americans.

6 Q. Did he comment at all about engaging in war with
7 other people that were voluntarily also engaging in war?

8 A. His understanding, at least the way he explained it
9 to me, was that when he got interested in this, he felt
10 that he was joining people who were involved in a
11 legitimate war abroad.

12 And he was as a Muslim, as a member of the
13 brotherhood, and the concept of brotherhood was very
14 important to him and I guess that's reflected in language
15 he uses and conversations, but the idea of belonging to a
16 brotherhood and helping your brother in struggles was
17 really his mind-set when he joined up.

18 Q. I guess what I'm trying to understand is, is it
19 relevant at all to you in your evaluation that he had a
20 desire to fight in a military setting, or on a, for lack
21 of a better expression, on a war field, and not
22 participating in random acts against people who are not
23 equipped to fight back?

24 A. Yes.

25 I mean his concept was he was joining up an army

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1 to fight a war.

2 Q. You came to learn in the course of your evaluation
3 that Justin had joined a mosque in Bay Shore, right?

4 A. Yes.

5 Q. And you came to learn that among various people that
6 he befriended was an undercover law enforcement operative.

7 Correct?

8 A. Yes.

9 Q. Did you engage in any particular dialogue with Justin
10 during your evaluation process regarding his dealings with
11 this operative?

12 A. Yes.

13 I mean, I asked him to tell me the story of his
14 involvement, how he met this individual and their
15 relationship and how their relationship progressed over
16 time.

17 Q. Did there come a time when Justin explained that he
18 genuinely thought that this operative was, in fact, a
19 member of Al-Qaeda or an offshoot of Al-Qaeda?

20 A. Yes, he did.

21 Q. And the fact that he genuinely believed that he was
22 an offshoot of Al-Qaeda, did that have any bearing on his
23 ability to move forward in a relationship and perform
24 certain acts together with this operative?

25 A. I believe it did.

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1 Q. Could you explain that further or would you like me
2 to narrow that really broad terrible question I just
3 asked?

4 A. The latter.

5 Q. All right.

6 So did there come a point in time that you
7 learned that Justin feared this operative?

8 A. He said that.

9 He said that he felt compelled to do what this
10 operative told him to do.

11 Q. And did he explain to you that he felt as though he
12 was kind of cornered and had --

13 THE COURT: This is very, very leading.

14 This is a very competent witness.

15 MR. LA PINTA: All right.

16 THE COURT: I'd like to have him explain his
17 perception of this issue rather than saying yes or no.

18 MR. LA PINTA: Sure.

19 BY MR. LA PINTA:

20 Q. Would you explain what relevant portions of the
21 discussion about the operative you found to be important
22 in your evaluation.

23 A. Well, there's several.

24 I mean, on -- his relationship with the
25 operative who he saw as a very close friend of his, was

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1 really his social connection to this group. So he felt
2 internally compelled to go along and to do what he did to
3 further that relationship, and the further he went the
4 more he felt included, the more he got to talk about his
5 interests and he had done such extensive reviews of the
6 various individuals involved, in the cells, how it
7 manifested itself in different countries.

8 We all heard on the tapes, the more information
9 he brought, the deeper he seemed to go into this, the more
10 he got into this operative's good graces, and that was
11 really important to him.

12 Q. Did there come a point in time that he explained that
13 he was encouraged to perform these acts and felt that the
14 operative was helping him to do that?

15 THE COURT: That's the same problem.

16 MR. LA PINTA: All right.

17 I'll withdraw it. Sorry.

18 BY MR. LA PINTA:

19 Q. Is there anything more you want to explain regarding
20 the operative in your fact finding mission?

21 A. Sure.

22 From what I gather from what Mr. Kaliebe told me
23 and from the tapes that I listened, Justin -- and this is,
24 I think, fairly typical of indoctrination of all types,
25 whether it's into a terroristic organization or a cult or

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1 anything else, is that there is a relationship that's
2 established where the individual, in this case
3 Mr. Kaliebe, is sort of encouraged to do more, to
4 participate, to come up with ideas as a way of furthering
5 their indoctrination, as a way of getting their buy in and
6 giving the individual the sense that they are really doing
7 this on their own, that they are coming up with ideas and
8 plans.

9 When, in fact, it's a careful sort of dance to
10 get that individual to feel that way.

11 Q. Have you ever heard of the term radicalization?

12 A. Sure.

13 Q. Does that term apply in these facts involving
14 Mr. Kaliebe?

15 A. Absolutely.

16 I mean, the evaluation of his interest in a
17 class in high school to his involvement in the offense
18 conduct is a path of radicalization. It's him becoming
19 indoctrinated through graduated exposure, through various
20 lectures, to a cycle of positive feedback if he were to
21 demonstrate and engage in certain behaviors, it's a
22 careful relationship that was manipulated by individuals
23 who wanted to indoctrinate him.

24 It all speaks to a process of indoctrination.

25 Q. Doctor, is there any other aspect of your evaluation

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1 that I have not asked you that you feel is relevant in
2 coming to the conclusions that you did here?

3 A. I mean, I think there is one aspect and I had the
4 chance to examine Mr. Kaliebe this morning again because I
5 hadn't seen him since my exam in January of 2014.

6 This is consistent with the review of the
7 medical records. Mr. Kaliebe was slow to mature. His
8 brain, as evidenced by the delayed early milestones,
9 walking, crawling, talking, the delay in his puberty, the
10 delay in developing other sexual characteristics, and even
11 on an emotional level, the chaos of his childhood delayed
12 the normal emotional development.

13 What I saw over time is that today he is a lot
14 more mature than he was when I examined him beforehand,
15 and looking back at that age, 17, 18, 19, he was very
16 immature and in my opinion was functioning more like a 13
17 or 14 year old than a young adult.

18 We all know that the brain develops well into
19 the 20s in normal individuals. In Mr. Kaliebe's case I
20 think it's going to take even longer. So he was not
21 acting and he was not at the same maturity level as his
22 chronological age would suggest.

23 Q. Do you believe that his incarceration and living in
24 close proximity with other inmates had anything to do with
25 that maturation process?

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1 A. It may have.

2 It's also just time and I think also the fact
3 that he got himself into this trouble, legal trouble
4 forced him to take a strong hard look at himself and his
5 life and I think that process, you know, helped things
6 along as well.

7 Q. Doctor, I want to direct your attention to the
8 various diagnoses that you have made here as an end
9 product of your evaluation of Mr. Kaliebe.

10 You have made a number of diagnoses, is that
11 correct?

12 A. Yes.

13 Q. What's the first diagnosis that you made?

14 A. What used to be called Asperger Syndrome is now
15 called Autism Spectrum Disorder. I think that's the most
16 prominent diagnosis to his conduct. Secondary to that is
17 the Kallmann syndrome which is the genetic disorder which
18 led to the delay in his puberty and other psychological
19 and medical problems.

20 Just prior to that he had been suffering from
21 depression related to his complicated youth and the
22 various problems that he had growing up.

23 Q. And do you reach that conclusion of him suffering
24 Autism Spectrum Disorder/Asperger Syndrome, based upon
25 your education, training and work experience?

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1 A. Yes.

2 Q. And you make that opinion upon a reasonable degree of
3 medical certainty?

4 A. I do.

5 Q. Regarding his particular offense conduct herein, have
6 you come to any medical conclusions or diagnoses or
7 findings as to his state of mind at the time the offense
8 was committed?

9 A. Yes.

10 It's my opinion with a reasonable degree of
11 medical certainty that at the time of the offense he was
12 functioning with a diminished capacity.

13 Q. Would you be able to describe or explain diminished
14 capacity a bit further to explain that?

15 A. Sure.

16 I mean, as a psychiatrist I look at it through
17 the lens of a medical problem. In other words, I'm trying
18 to do a psychiatric evaluation and then apply my findings
19 to a legal concept which is in this case an issue of
20 mitigation at sentencing.

21 So the question is, was he suffering at the time
22 from any mental disease or defect, which would have caused
23 an impairment in his ability to appreciate the nature and
24 consequences of his act or their wrongfulness.

25 And it's my opinion because of the Asperger

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1 Syndrome and the other secondary diagnosis, that although
2 Mr. Kaliebe knew what he was doing, and it's clear from
3 the evidence that he understood the nature of his act and
4 he even understood the consequence and knew that it was
5 wrong, in my opinion, the problems with his development,
6 his social issues prevented him from really appreciating.

7 In other words, he knew it on a superficial
8 level, but really couldn't appreciate it in a much sort of
9 deeper, more relevant emotional big picture kind of way
10 and in my opinion, that impairment was substantial enough
11 to impair his ability to do that and, therefore, was
12 consistent with a diminished capacity.

13 MR. LA PINTA: I have nothing further.

14 Thank you, Dr. Bardey.

15 THE COURT: Mr. Canty, are you going to handle
16 the cross?

17 MR. CANTY: Yes, your Honor.

18 THE COURT: Do you anticipate that this will
19 take us past 1 o'clock?

20 It might?

21 MR. CANTY: It might.

22 THE COURT: Then we'll take the afternoon
23 recess.

24 We'll take an hour and 15 minutes. We'll resume
25 at a quarter of 2.

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1 MR. LA PINTA: Thank you, Judge.

2 MR. CANTY: Thank you.

3 THE COURT: Doctor, we'll see you after lunch.

4 THE WITNESS: Thank you.

5 (Luncheon recess.)

6 (Continued on next page.)

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1 A F T E R N O O N S E S S I O N

2 (Judge Hurley enters the courtroom.)

3 THE COURT: Good afternoon, everybody.

4 Mr. Canty.

5 MR. CANTY: Thank you, your Honor.

6 CROSS-EXAMINATION

7 BY MR. CANTY:

8 Q Good afternoon, Dr. Bardey.

9 A Good afternoon, Mr. Canty.

10 Q How are you?

11 A Okay.

12 Q You testified about the forensic examination and
13 subsequent report you produced in relation to the defendant
14 Justin Kaliebe, correct?

15 A Yes.

16 Q The most important factor in making sure that a report
17 is accurate would be that the information you received is
18 the truth, correct?

19 A Sure.

20 Q So, if you don't get the truth, that would affect the
21 validity or the usefulness of the report, correct?

22 A It depends on what specific factor you are talking
23 about. There are some factors -- not every factor is as
24 important as the next. So there might be some instances
25 where that might be the case, and some instances where it

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1 might be irrelevant.

2 Q But you would agree with me that at its base, the truth
3 is the most important thing to have in evaluating an
4 individual for a report, correct?

5 A I'm trying to get to the truth, sure.

6 Q Okay.

7 It is true that in order to make sure you have the
8 truth, you try to corroborate information that a patient or
9 an individual that is being evaluated gives you, correct?

10 A Correct.

11 Q So, for example, if they told you when they were born,
12 for example, a birth certificate would be good corroboration
13 of that material, right, of that information?

14 A For instance.

15 Q Yes.

16 In this case, you received information from the
17 defendant, correct?

18 A Yes.

19 Q About his upbringing and about his family life,
20 correct?

21 A From him and from other sources.

22 Q I'm getting to that.

23 Okay. You corroborated some of that with his
24 family, correct?

25 A And some from the medical records as well.

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1 Q You would agree with me that the medical records are
2 more reliable than information provided by the family,
3 because the family may have a certain bias, right?

4 A Not necessarily. Certainly the family may have a bias,
5 but the medical information was recorded with a slightly
6 different purpose. So different questions might have been
7 asked and less elaborations might have been obtained. So it
8 is not necessarily true.

9 Q Well, you would agree with me that family members of
10 individuals, in this case that are facing sentence and were
11 seeking mitigation from the court, may have a tendency to
12 exaggerate the existing conditions in order to put forward
13 that mitigation argument?

14 A Of course.

15 Q And you take that into account, correct?

16 A Correct.

17 Q The purpose of your examination was to determine what
18 Mr. Kaliebe's mental state was at the time that he was
19 committing this offense, right?

20 A Yes.

21 Q And you would agree with me that speaking to people
22 that he interacted with during that time period would be
23 important in determining what his mental state was, right?

24 A Could be.

25 Q I mean, yes or no, right, speaking to people that he

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1 was dealing with while he was committing a crime, that would
2 be relevant in determining what his mental state was, right?

3 A Sure.

4 Q And you interviewed the defendant, correct?

5 A Yes.

6 Q Where did you interview the defendant?

7 A At the MDC in Brooklyn.

8 Q Do you recall the date you interviewed him?

9 A It was January 15 of 2014.

10 Q When you go to the MDC, do you sign in before you get
11 in there?

12 A Yes.

13 Q You have to sign out before you leave?

14 A Yes.

15 Q How long was your meeting with the defendant?

16 A My whole trip to the MDC was three hours.

17 Q When you say your whole trip, that means leaving your
18 office, going to the MDC, interviewing, then going back to
19 your office?

20 A No. I think in and out of the institution.

21 Q In and out of the institution.

22 How long did it take you to get into the
23 institution? It is not a quick process.

24 A No, it is not. My interview at the MDC could be 15
25 minutes to 45 to get access to the client.

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1 Q And the total time was three hours?

2 A I think so, yes.

3 Q Okay.

4 You are certain that you signed in and signed out
5 that day?

6 A I'm certain I signed in. Signed out, I'm not.

7 Q Okay.

8 To the best of your recollection, it was about
9 three hours?

10 A Yes.

11 Q And based upon your three-hour evaluation of the
12 defendant, you made a determination, coupled with the other
13 information that you reviewed, that the defendant suffered
14 from diminished capacity when he was committing the offense;
15 is that right?

16 A Precisely.

17 Q And you defined diminished capacity as what is not
18 fully appreciating the wrongfulness of his conduct?

19 A In this case, yes.

20 Q In this case.

21 What would be some indicia -- let me ask you it
22 this way: If an individual understood that the consequences
23 of committing an act, not talking about in this case, were
24 that they may be arrested, prosecuted, and incarcerated,
25 would that go towards determining whether or not they fully

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1 appreciated the wrongfulness of the act they were about to
2 commit?

3 A Sure.

4 Q So when an individual says I understand that I may be
5 arrested, I may go to jail, I may spend the rest of my life
6 in jail, that would be relevant in determining whether or
7 not they fully appreciated the consequence of their conduct,
8 correct?

9 A It would certainly go to them knowing. It wouldn't
10 necessarily speak to them appreciating. Appreciating would
11 require more than just saying it. It would require the
12 ability to put it into a context to understand specifically
13 what that meant, not just know it in some kind of rote kind
14 of way.

15 Q Fair enough.

16 There was nothing in your evaluation of the
17 defendant that indicated to you that he had trouble
18 perceiving time and space, correct?

19 A No, no issues with time and space.

20 Q So he understood an event when spending the rest of his
21 life in prison?

22 A I think he understood, he knew what that meant, yes.

23 Q Now, you also -- with respect to the diminished
24 capacity, you are not claiming that he didn't understand the
25 wrongfulness of his actions, are you?

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1 A I'm saying that he didn't fully appreciate the
2 wrongfulness of his actions.

3 Q And you would agree with me that an individual that saw
4 other individuals or no other individuals committed similar
5 conduct to which they were going to commit, and the
6 consequences of that, appreciate that the conduct is wrong,
7 would you agree with that proposition?

8 A No, not necessarily.

9 Q So if an individual says, you know what, that guy
10 killed his sister and went to jail for the rest of his life,
11 and you know what, I will kill my sister, you would agree
12 with me that that would be certainly an appreciation of the
13 act that is wrong and that there are consequences of that
14 act; is that correct?

15 A Yes, because it goes to knowing, not necessarily speaks
16 to appreciating it.

17 Q Let's talk about Mr. Kaliebe's intelligence level.

18 You testified that he was of average intelligence,
19 correct?

20 A I did.

21 Q In fact, in reviewing some of the materials, it
22 indicated that his verbal comprehension skills were above
23 average, correct?

24 A Yes.

25 Q So his ability to perceive, understand, and convey

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1 information verbally was above average?

2 A That element of his testing didn't test for all three
3 of those propositions. You are sort of asking three
4 questions.

5 Q Let's ask, his ability to communicate was above
6 average, correct?

7 A I don't know. I don't think so. I don't think his
8 ability to communicate is above average. His ability to
9 understand things is above average, but his ability to
10 communicate is not.

11 Q Okay.

12 So, his ability to understand is above average?

13 A Yes.

14 Q And when you met with him during that let's say
15 three-hour period, two hours and 45 minutes to three hours,
16 it took you a little while to get in, during that time
17 period, let's call it three hours, what tests did you give
18 him to determine whether or not he fully appreciated or
19 didn't appreciate the wrongfulness of his conduct?

20 A Well, first of all, there are no specific tests for
21 that particular question.

22 Q My question is, did you give him any tests?

23 A I'm trying to answer your question. You can't give a
24 test if one doesn't exist for that particular purpose. So
25 my answer is no, it would be misleading. I want to be as

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1 correct as possible, because there are no tests for that and
2 none to administer in that particular area.

3 Q Did you administer any tests to the defendant?

4 A By the time I had evaluated him, I had received all of
5 the various records, and he had undergone extensive testing
6 within the prior year or two which really covered a lot of
7 his psychological and psychiatric functioning. So I did not
8 see a need to actually perform any additional psychological
9 tests.

10 Q So the answer is no, you did not give him any tests?

11 A Correct, and I explained why.

12 Q I understand. I just want to be clear. During that
13 two-hour and 45-minute period, there were no tests
14 administered to him?

15 A No, I was just talking to him.

16 Q You would agree with me that the validity of those
17 tests and the usefulness of those tests is predicated on the
18 individual given that test accurately, correct?

19 A No, that's not true for all tests. Some tests have a
20 built-in validity scale, others don't. So not every test is
21 predicated on the truthfulness. Some tests don't have those
22 scales built into them. I can't answer for all tests.

23 Q I think you misunderstood my question.

24 My question is you relied on the individual giving
25 the test, the test giver, giving it accurately?

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1 A Yes. I mean individuals with valid licenses are
2 considered competent to administer certain tests, yes, I
3 admit that assumption.

4 Q And there are times where you give tests to some
5 patients?

6 A Sure.

7 Q You did not in this case?

8 A Correct.

9 Q Now, in your report, you didn't opine as to whether or
10 not Mr. Kaliebe is a danger to society, did you?

11 A No, that was not a question asked of me.

12 Q And in fact you can't opine as to whether or not he is
13 or remains a danger to society, correct?

14 A I am not sure, why can't I?

15 Q I'm asking you --

16 A I didn't in my report. That wasn't a question asked.
17 Many questions I didn't answer either, but that was one of
18 them, sure.

19 Q Other than that one time you met with the defendant,
20 the next time you met with him was this morning, correct?

21 A Precisely.

22 Q And when did you -- how long after he was arrested did
23 you meet with him?

24 A Less than a year, about ten months.

25 Q And you would agree with me that incarceration may have

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1 in some cases a profound impact on an individual?

2 A Of course.

3 Q An individual that has previously suffered from
4 depression, and may have a profound impact on him, correct?

5 A It could.

6 Q The fact that they are incarcerated and they lost their
7 liberties and freedom may have an impact on their ability to
8 communicate or carry on a conversation with somebody giving
9 them, or having a conversation with them, correct?

10 A I mean, are you talking about is it a possibility? It
11 is a possibility. It is not a very common one. People
12 don't usually lose the ability to communicate because of
13 depression, especially if they are speaking to someone who
14 is evaluating them. They tend to want to talk to that
15 person.

16 Q My question is, the condition of Mr. Kaliebe couldn't
17 change from the time he was arrested and committing the
18 crime to the time you interviewed him based on the period of
19 incarceration?

20 A It could have, sir.

21 Q So, it's fair to say that the most accurate way in
22 determining what his mind set was and what his mental
23 condition was would be to have direct evidence of how he was
24 conducting himself at the time he was committing the
25 offense, correct?

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1 A I guess it would depend on where that information was
2 coming from.

3 Q Well, you could interview people that he was with,
4 correct?

5 A Yes.

6 Q Even better than that, if you had videotape recordings
7 of him interacting with individuals while committing the
8 crime, that would be even better, right?

9 A It would provide some information. That's not saying
10 it's a psychiatric evaluation. But it would provide some
11 information, sure.

12 Q Logic and common sense would dictate that if you had
13 information of a recording of how he was committing a
14 criminal act, that would provide a far better insight than
15 an interview that is done of the defendant after
16 incarcerated a year later, correct?

17 A Not necessarily.

18 Q Well, you don't have the bias, correct, that's gone,
19 right?

20 A Sure.

21 Q And the motive to lie would be gone. Presumably in
22 this case the defendant didn't know he was being recorded,
23 correct?

24 A Right, but a video of someone behaving in a certain way
25 and saying certain things doesn't necessarily shed any light

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1 on whether they were thinking at that moment in time or
2 whether they were capable or not incapable of doing it.

3 Q All right.

4 What about the act of attempting to board a plane
5 to go to a foreign country to fight on behalf of al-Qaeda,
6 would that be relevant?

7 A I know that happened walking down the gangway of a
8 plane to get in, wouldn't have shed additional light on that
9 fact.

10 Q Well, it's a fact, though, that there were recordings
11 of the defendant with an undercover officer immediately
12 prior to him being arrested, within days of being arrested,
13 that you did not view; is that correct?

14 A Before my report, you are right.

15 Q So you conducted your report and came to an evaluation
16 without viewing the direct evidence, which was the
17 undercover interacting with Mr. Kaliebe in days leading up
18 to him being arrested, correct?

19 A Correct.

20 Q And you would agree with me that that would have been
21 an important piece of information for you to review,
22 correct?

23 A It wasn't. Eventually I did review those recordings
24 and it just confirmed my opinion and diagnosis of Mr.
25 Kaliebe.

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1 Q In fact, you have been criticized in the past with
2 respect to taking the word of a subject, as opposed to
3 looking at direct evidence; isn't that correct?

4 A I'm not sure exactly what -- you are obviously hinting
5 at some case.

6 Q Yes, People v. Oliver, are you familiar with that case?

7 A I don't remember.

8 Q Judge Donnelly, who is now a district court judge in
9 the Eastern District of New York, criticized you for taking
10 the word of an individual that was involved in a recording,
11 when the recording was available for you to review; isn't
12 that correct?

13 A I don't remember that.

14 MR. CANTY: Just for the record, that's Oliver --
15 People of the State of New York v. Oliver, 991 New York 2d.
16 260. I will provide a copy of that to defense counsel and
17 the court.

18 Q You also testified that you spent 70 percent of your
19 time testifying on behalf of defendants, and about 30 for
20 the government; is that right?

21 A I'm not too sure I testified -- as opposed to retained?

22 Q Yes.

23 A I don't remember -- 60/40 or 70/30 is about the
24 breakdown.

25 Q You also indicated you were retained by the Eastern

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1 District of New York in the past; is that correct?

2 A I think so, yes.

3 Q When was the last time you were retained on a so-called
4 matter by the Eastern District of New York?

5 A I don't remember.

6 Q More than five years ago?

7 A Again, I don't remember. I don't recall.

8 Q You have no independent recollection?

9 A When we were retained by the Eastern District.

10 Q How long do you spend -- what percentage of your
11 practice do you spend involved in providing expert testimony
12 or expert reports on behalf of criminal or civil matters?

13 A Probably 80 percent criminal, 20 percent civil.

14 Q My question -- okay. Out of that 100 percent, how much
15 of your professional practice do you spend involved in
16 matters pertaining to the criminal justice system and
17 providing reports to the court, 50 percent, 60 percent,
18 70 percent?

19 A Probably 80 percent. I have one day a week where I see
20 patients, and the rest of the time I am involved in forensic
21 work.

22 Q So 80 percent of your professional practice is involved
23 in being an expert witness or professional witness on behalf
24 of parties; is that correct?

25 A Doing forensic work, which also involves contra law

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1 program. I consider all of that forensic work, in addition
2 to doing consultation for attorneys and D.A.s.

3 Q Now, during the -- in your evaluation report you
4 determined that the defendant suffered from Autism Spectrum
5 Disorder, correct?

6 A Yes, correct.

7 Q How would you define Autism Spectrum Disorder?

8 A Well, the DSM-5, which is the Diagnostic Statistical
9 Manual, which is the book that codifies all of our
10 psychiatric diagnoses, came out at the end of 2014, it
11 recategorized Asperger's Syndrome as an Autism Spectrum
12 Disorder. So, it's a new name that describes Asperger's
13 Syndrome, which is the diagnostic criteria or test that has
14 a significant impairment with social communications or
15 interactions, as well as restricted or limited interest in
16 activities. Then there are other criteria in terms of time
17 and that being caused by other things such as that.

18 Q And you found -- you found that you diagnosed Mr.
19 Kaliebe with that, was that based largely on the information
20 you received from his treating physician, Dr. Hitner?

21 A No. It was based on what Dr. Hitner said. It was
22 based on the testing done by Dr. Savage, was based on my
23 direct examination of Mr. Kaliebe, based on my review of
24 records that had shown a history of these kinds of behavior,
25 and it was based on an interview with his mother and sister.

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1 Q And you would agree with me that Justin didn't have
2 difficulty in communicating with people socially, right?

3 A He did have difficulty communicating with people
4 socially. He had very few friends throughout his life.
5 When he was a child, he played pretty much by himself,
6 either with his sister, or when he got older, moved to a
7 different school, was pretty much playing with video games
8 on his own. Eventually when he developed an interest in
9 reading, a lot of his time was spent reading. He didn't
10 have a lot of rich social connections with others. That
11 seems to have been something that was consistent throughout
12 his life, except more recently.

13 Q Except when he made more friends?

14 A In Brentwood, around this specific restricted interest,
15 which was the Islam and his faith.

16 Q Why do you refer to that as a restricted interest?

17 A Because in my opinion it's like other interests that I
18 spoke about on direct. It was typical of how he would dive
19 into an interest, and if that interest would become all
20 consuming, that would be all that he talked about, whether
21 it was wrestling, hockey, the Civil War, or Marines in the
22 past. Now it was this.

23 Q But in this case he made friends, correct?

24 A Correct. He found other people that were like-minded
25 in terms of having the same interest. So suddenly talking

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1 about this was his conduit to actually developing a social
2 life.

3 People with Asperger's want to be social; they
4 just don't know how. And so sharing this interest permitted
5 him to do what he really wanted to do was to have friends
6 which felt like he was connected to something.

7 Q In fact, he did make friends, correct?

8 A If you can call them that, sure.

9 Q Well, there were people he socialized with, right?

10 A Around the mosque, yes.

11 Q Are you aware he went out to meals with them?

12 A He went out to meals, and even went to a fasting event
13 with them. I mean, there were different meetings and
14 lectures that he would go to.

15 Q So this was different than the other individual
16 activities that he focused in on in that in this instance it
17 helped him socialize with other people his age, correct?

18 A Correct.

19 Q And, in fact, it is not -- when you say it's a
20 restricted area in which he's looking at, that wasn't the
21 case here. He, as you said, went rafting with this group of
22 people, correct?

23 A But it was all --

24 Q I know it may be difficult, but just answer my
25 questions yes or no and we can move this along.

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1 He went rafting with them; is that correct?

2 A Yes.

3 Q He went out to meals with them, correct?

4 A Yes.

5 Q And he socialized with them, correct?

6 A Yes.

7 Q And, in fact, are you aware that in a number of those
8 instances were recorded where he was meeting with
9 individuals other than the undercover officer?

10 A Yes.

11 Q When the undercover officer was present?

12 A Yes.

13 Q Did you review throws?

14 A I reviewed all of the tapes that the attorney provided
15 for me. I don't know if that's the entire universe of them,
16 but there was a large number of them.

17 Q And, in fact, the reporting and the interviews that you
18 had seemed to suggest that he was no longer suffering from
19 depression, right?

20 A Correct.

21 Q And that he appeared to be happy?

22 A Correct.

23 Q And, in fact, there's a number of reporting -- reports
24 that indicate that throughout his life individuals that have
25 done clinical evaluations of Justin have described him as

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1 happy and intelligent, correct?

2 A I'm sorry, I didn't get those words.

3 Q Happy and intelligent?

4 A No, before, what kind of evaluation?

5 Q The clinical evaluations that you looked at from the OT
6 to PT to psychological examination, there were reports that
7 described him as being happy and intelligent?

8 A In the past, then he became depressed in
9 mid-adolescence.

10 Q And then we know prior to committing the criminal
11 offense, he became socializing with people his own age?

12 A Correct.

13 Q In fact, there was testing that revealed that his
14 visual motor and his perceptive scores were average to above
15 average, correct?

16 A I'm not sure what testing you are referring to.

17 Q I'm referring to your report. I will get you the cite.
18 Metro Therapy?

19 A Oh, the Metro Therapy.

20 Q It's for your reference, if you have your report in
21 front of you, page 10. I will put it up on the screen.
22 Look at the TV. Testing revealed visual motor and visual
23 perceptive scores in average to above average range?

24 A Yes.

25 Q Additionally, you said that he had trouble making

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1 friends, but your report indicates that he had at least one
2 friend that died of what appears to be an alcohol overdose,
3 correct?

4 A Correct.

5 Q So, he did have the ability to make friendships in 8th
6 grade?

7 A He had one friend. Typically kids in 8th grade would
8 have a lot more than one friend. So that is small enough.

9 Q Sir, I don't mean to be difficult, sir, but the
10 question is he did create a friendship. You said he had no
11 friends as a child. He at one point had one friend,
12 correct?

13 A He had a friend.

14 Q In fact when you interviewed him, your notes indicate
15 that he gave you the name and number of two of his friends,
16 correct?

17 A Correct.

18 Q Did you contact either of those individuals?

19 A No.

20 Q You never spoke to them to determine what kind of
21 social relationship they had with Mr. Kaliebe, did you?

22 You have no idea what kind of relationship existed
23 between Mr. Kaliebe and those two individuals, right?

24 A Correct.

25 Q Would that have been important had you found out that

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1 he had a close friendship with those two individuals?

2 A If that would have been important to contact them, I
3 would have.

4 Q Now, you also during your interview of the defendant,
5 and this is at page 26 of your report, and I will put it up
6 on the screen for you.

7 You wrote: Mr. Kaliebe also reported that there
8 came a time when he started thinking maybe I shouldn't go
9 through with it, but I was afraid what he, the undercover,
10 or they would do because they were al-Qaeda. Mr. Kaliebe
11 explained that the undercover would expect money every time
12 they met, and Mr. Kaliebe did not have the money undercover
13 would get "get angry with me, he'd yell at me I just got
14 worried", that's what the defendant told you?

15 A Yes.

16 Q And you had the opportunity to listen to the recordings
17 that were provided to you, correct?

18 A Yes.

19 Q And on none of those recordings do you hear the
20 undercover demanding money from Mr. Kaliebe, correct?

21 A Correct.

22 Q So that was an inconsistent statement that he gave to
23 you, correct?

24 A Not necessarily. His perception may have been that in
25 fact the guy was getting angry with him. He's not very good

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1 at reading emotion.

2 Q I'm not talking about emotion. I'm talking about the
3 specific define claim that he demanded money from him every
4 time they met. You never found any of that on any of the
5 recordings, correct?

6 A No.

7 Q Did you ever ask defense counsel or the defendant if he
8 could cite to the specific example where money was demanded
9 and he was yelled at?

10 A No, I didn't.

11 Q So you didn't look to verify the voracity of the
12 statement that Mr. Kaliebe gave you?

13 A Not this one, no.

14 Q Moving on. It said: He admitted that sometimes he
15 would stop eating lunch at the school so I could give pay
16 money to the undercover. Mr. Kaliebe said, "stopped
17 treating myself" with money he made from his job or handed
18 to him by his parent and "gave it all" to the undercover.

19 Were you able to independently verify that claim
20 that he gave all of his money to the undercover on any of
21 the recordings given to you?

22 A It wouldn't be on the recordings.

23 Q Well, if he said I gave him -- every time I met with
24 him, I gave him my money, and every time they met, it was
25 recorded, that would be on one of the recordings, correct?

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1 A Where? Sir, what you are saying is incorrect?

2 Q Let me repeat the question.

3 A What you are quoting from the report is not what is in
4 my report, so I can't answer that question.

5 Q I will read it again.

6 Mr. Kaliebe stated that he "stopped treating
7 myself" with money he made from his job or handed to him by
8 his parent and "gave it all" to the undercover; and, as I
9 related to you before, did Mr. Kaliebe explain that the
10 undercover would expect money every time they met?

11 A Right.

12 Q And if every time they met was recorded, you would be
13 able to verify whether or not the statement Mr. Kaliebe told
14 you was the truth, that every time they met the undercover
15 demanded money from him, right?

16 A Expect and demand are two different things, and
17 expectation doesn't mean it is realized.

18 Q Sir, this is a straightforward question.

19 A And I cannot answer the question the way you are asking
20 for it.

21 THE COURT: Two people speaking at once.

22 THE WITNESS: Sorry.

23 Q I will ask it this way: When you listen to recordings,
24 you never heard the undercover ever demand money from Justin
25 Kaliebe, correct? On the ones you listened to, you never

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1 heard it, right?

2 A Sure.

3 Q When you interviewed Mr. Kaliebe, he was able to answer
4 your questions intelligently, correct?

5 A Yes. He wasn't confused or demented or mentally
6 impaired in the way he couldn't answer my questions, no.

7 Q His answers were not inconsistent, or, for lack of a
8 better term, they didn't come out of left field. They were
9 consistent with the questions you asked?

10 A When he was answering my questions, he wasn't suffering
11 from a psychotic disorder. I didn't diagnose that. There
12 was no evidence of a thought disorder, wasn't rambling or
13 giving irrelevant answers, no. He was not psychotic.

14 Q Okay.

15 Now, you've diagnosed with him Autism Spectrum
16 Disorder, which now incorporates Asperger's Syndrome,
17 correct?

18 A Correct.

19 Q You agree with me that individuals that have been
20 diagnosed with Asperger's Syndrome can live meaningful
21 lives, correct?

22 A Yes.

23 Q They can marry, correct?

24 A Yes.

25 Q Have children?

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1 A Absolutely.

2 Q They can carry out successful careers, correct?

3 A Absolutely, some can and some cannot. It depends on
4 the impact of the disorder or on one's function.

5 Q In fact, they understand right from wrong, right?

6 A Sure.

7 Q They understand the consequences of their actions when
8 they engage in them, correct?

9 A It depends which ones. It is hard to generalize and
10 speak to an entire class of people. I evaluated many
11 individuals with Asperger's, and some have those capacities
12 and some don't. Some get involved in illegal activities
13 because they don't appreciate the wrongfulness of their
14 activities, and others are able to appreciate the
15 wrongfulness. You can't make a blanket statement one way or
16 the other.

17 Q Well, the first time we heard the term as Berger
18 syndrome or autism where it was diagnosed was some six
19 months after Mr. Kaliebe was arrested, correct?

20 A Incorrect.

21 Q Somebody diagnosed him before June of 2013?

22 A If you look at Dr. Savage's testing, she administers a
23 specific test for Asperger's, and it comes back with a high
24 probability that he has Asperger's, and in other areas of
25 the record the question is raised. So, throughout the

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1 record there are multiple --

2 Q No, my question is --

3 A Many times where that diagnosis is raised as a distinct
4 possibility.

5 Q The first time he was ever diagnosed with Asperger's
6 was six months after he was arrested, correct?

7 A Yes.

8 Q Thank you.

9 Now, Mr. Kaliebe told you -- what did he tell you
10 with respect to his drug use, do you remember?

11 A Yes, that he had used marijuana in the past, had gotten
12 heavier at the time he got more depressed, and it stopped
13 once he converted to Islam. He used twice more after he
14 converted, and then stopped thereafter. I think he started
15 around the age of 12.

16 Q You said during your interview that when he was not
17 picking up on certain cues that you had given him, what were
18 you referring to there?

19 A Well, in the normal conversation that you have with
20 someone who is not impaired with an inflection like
21 Asperger's, if you say something that is more serious, they
22 read that and they respond in kind, if you say something
23 that is funnier. Mr. Kaliebe didn't have that ability when
24 I saw him. It was almost like you were talking to a bank
25 teller through a glazed window. It wasn't clear that there

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1 was reciprocity in terms of non-communication.

2 Q Do you indicate refer to that in your report?

3 A No. It was an impression I got during the course of
4 the evaluation.

5 Q You also received information that he stood up to
6 bullies?

7 A Somewhere, either he told me or I read it in the report
8 that it happened on at least one occasion.

9 Q And did he ever claim to you that he was bullied?

10 A He said no, but his sister said that he had in fact he
11 had really been ostracized and being put in a separate room
12 when in school. So he may not have wanted to admit it, but
13 his sister gave a credible history of it happening.

14 Q Or it didn't have, and he said it didn't happen. We
15 are taking him on his word on a number of other factors,
16 correct?

17 A There would be a reason why he wouldn't want to talk
18 about him being bullied.

19 Q That's not my question.

20 My question is he could have been telling the
21 truth when he said he wasn't being bullied, right?

22 A He could have, but I don't think his sister lied
23 either. The way I heard those two apparently conflicting
24 reports was that the sister was likely telling the truth.
25 She had given a lot of other rich examples of his prior

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1 functioning.

2 Q So, it is fair to say that Mr. Kaliebe told you that
3 you accepted as true, and there are other things that you
4 accepted as being false?

5 A Well, I don't think anybody on examination says
6 everything accurately, whether they are intentionally lying
7 or not.

8 Q Sir, my question is simple. There were certain things
9 that Mr. Kaliebe told you that you accepted as true, and
10 other things he told you that you perceived to be not the
11 truth, correct?

12 A I guess so. I don't think I would characterize it as a
13 lie or not the truth. I don't think people give necessarily
14 complete accounts of their lives, and don't necessarily tell
15 their story always in the same manner. So things would be
16 omitted and not provided.

17 Q Now, you also mentioned that there were two instances
18 where he showed examples of compassion, where he understood
19 or perceived justice versus injustice, correct?

20 A Yes.

21 Q So that would be, for lack of a better term,
22 understanding right from wrong?

23 A Yes.

24 Q In a larger sense, right?

25 A In a larger sense, I would agree.

Bardey - Cross/Canty

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1 Q So, the examples given were appropriate for somebody
2 being able to comprehend right from wrong?

3 A I would agree with that.

4 Q So, quitting a club because he perceives that children
5 of color where being discriminated against, that would be
6 perceived as appropriate conduct for somebody who believes
7 that is incorrect?

8 A That's fair to say.

9 Q Quitting a Police Explorer's Organization that he
10 perceived to be engaged in racial profiling, that would also
11 be appropriate in determining right from wrong?

12 A Sure.

13 Q In two instances, these are authorities that he was
14 essentially saying you're wrong and I'm going to step aside
15 because I know right from wrong, right?

16 A Correct.

17 Q And bullies, bullies are perceived as powerful
18 individuals, and in one instance he, Mr. Kaliebe, told you
19 he stood up to bullies, right?

20 A Yes.

21 Q He took on -- bullies succeed because they exert either
22 physical or psychological authority over other individuals,
23 correct?

24 A Fair to say.

25 Q He was able to stand up to that physical and

Bardey - Cross/Canty

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1 psychological power and say "stop?"

2 A Precisely.

3 Q Now, you talked to him about carrying out acts of
4 violence, correct?

5 A Yes.

6 Q And you said that his response was he wanted to go over
7 there to I believe it was to reclaim land?

8 A Right. It seemed to have been about land-based
9 injustice.

10 Q You knew that the organization that he wanted to join
11 was al-Qaeda, correct?

12 A Correct.

13 Q You're not suggesting that you didn't know that
14 al-Qaeda exerts authority through brute force and violence,
15 right?

16 A No, of course not, but the issue is what Mr. Kaliebe
17 knew.

18 Q Well, were you aware that at the time he was watching
19 radical, violent Jihad videos?

20 A I am.

21 Q And yet you noted he comprehended and understood what
22 they were about, right?

23 A Wrong.

24 Q And were aware at the time he was espousing the beliefs
25 of Osama Bin Laden and Qusar al-Shariq?

Bardey - Cross/Canty

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1 A The latter. The former, I'm not sure.

2 Q Mr. Kaliebe espoused violence against the United states
3 among other groups?

4 A Yes.

5 Q Doctor, you have no idea when Mr. Kaliebe formed his
6 intent to join al-Qaeda, do you?

7 A It was somewhere after 2010, when he converted to Islam
8 and got together with a group from Brentwood and started to
9 get involved in the mosque and all of that. So he went back
10 and forth in 2011, in terms of getting closer and moving
11 away from them. So it was sometime between that and his
12 arrest that he formed the intent.

13 Q And you are aware that was long before he had any
14 interaction with the undercover?

15 A 2011 was about the time he had the contacts with the
16 undercover, I believe.

17 Q You are aware that he joined the mosque and began to
18 socialize with those people in Brentwood -- those
19 individuals in Brentwood, before he met the undercover?

20 A Of course.

21 Q Okay.

22 Did you ever have a discussion with the defendant
23 regarding this individual here on the left? This is
24 Government Exhibit 101.

25 A No.

Bardey - Redirect/LaPinta

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1 Q Do you know who that is?

2 A I do not.

3 Q Did he ever mention to you an individual named Marcos
4 Zea?

5 A Yes.

6 Q That was a friend he made, correct?

7 A Yes.

8 MR. CANTY: Your Honor, I have no further
9 questions.

10 Thank you, Doctor.

11 THE COURT: Thank you, Mr. Canty.

12 Mr. La Pinta, redirect?

13 MR. LA PINTA: Thank you.

14 REDIRECT EXAMINATION

15 BY MR. LA PINTA:

16 Q Dr. Bardey, very quickly and briefly.

17 You testified in response to one of Mr. Canty's
18 questions that there is no specific test to be administered
19 to determine diminished capacity; is that right?

20 A Correct.

21 Q And are you aware of various tests that were conducted
22 by Dr. Borrel, the government's expert witness here?

23 A Yes.

24 Q Do you recall offhand which tests they were?

25 A The WASI, W-A-S-I, and the MCMI-3.

Bardey - Redirect/LaPinta

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1 Q Is the WASI test a test for diminished capacity?

2 A Neither test does.

3 Q Nor does the MCMI-3, right?

4 A Yes, because diminished capacity is not a psychological
5 diagnosis.

6 Q Now, regarding your review of the recordings. You had
7 testified that you had reviewed recordings that I had
8 provided, correct?

9 A Correct.

10 Q Did you also review transcripts of recordings that I
11 provided?

12 A I did.

13 Q And would you agree that the transcripts of the
14 recordings that I provided were extensive, correct?

15 A Yes.

16 Q And that you read all of the transcripts there?

17 A I did.

18 Q Do you know firsthand whether every single dealing with
19 the undercover was recorded?

20 A I do not.

21 Q Did I ever tell you that every single dealing with the
22 FBI was recorded?

23 A You did not.

24 Q You were asked questions by Mr. Canty regarding one
25 friend that Mr. Kaliebe had, right?

Bardey - Redirect/LaPinta

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1 A Yes.

2 Q And can't recall the boy's name, but it was a friend
3 that perished, right, he died?

4 A Yes.

5 Q Regarding the death of that one friend, would you agree
6 that that was an extremely traumatic event for Mr. Kaliebe
7 at that age?

8 A It was.

9 Q And does it change anything about his ability or
10 limitations to socialize that he had a friend?

11 A No. A friend, if anything, highlights how few friends
12 he had in his life. I think just having one friend, when we
13 think about the normal functioning of an 8- or 10- or
14 12-year-old, they typically have a number of friends. So
15 having just one friend is pathological, in my opinion.

16 Q Mr. Canty also asked you questions about the interview
17 with Mr. Kaliebe and him telling you the names of two other
18 friends, right?

19 A Yes.

20 Q Do you recall whether they were other friends that he
21 had from the mosque or earlier Islam?

22 A I think they were friends from the mosque.

23 Q And did he give you any other particular description of
24 who these friends were?

25 A No.

Bardey - Redirect/LaPinta

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1 Q Regarding your analysis, review of records, and
2 ultimate opinions here, has it changed whatsoever the fact
3 that he had two friends at the mosque?

4 A No. I mean, as we discussed earlier, I think his
5 friendships at the mosque were specifically through this
6 very restricted interest, which was fueled by the
7 undercover, which was fueled by his common interest these
8 people had. So I see those as flowing from his autism
9 spectrum disorder, rather than being a separate friendship.

10 Q In the course of your experience as a treating
11 psychiatrist and an evaluator, did you have an occasion to
12 come across young people that had been victims of bullying
13 before?

14 A Of course.

15 Q And is it common to come across a bullying victim who
16 is reluctant to acknowledge that they are being bullied?

17 A No. Victims of crimes, or crimes that make one feel
18 somehow less, victims of sexual abuse, victims of rape,
19 victims of assault, or bullying are often reluctant to speak
20 about having been victimized.

21 Q Independent and aside from your interview with Mr.
22 Kaliebe, do you recall reading in any of the records, most
23 notably when he was in middle school and high school, that
24 he was picked on and made fun of by other students?

25 A Yes.

1 Q And does that -- obviously in your opinion does that
2 corroborate with what his sister said to you?

3 A Obviously.

4 Q Just so that we are clear, Dr. Bardey, you are not
5 saying here that Mr. Kaliebe was not able to determine what
6 is right from what is wrong, correct?

7 A Correct.

8 MR. LA PINTA: With that, sir, thank you for your
9 time.

10 THE COURT: Thank you, Mr. La Pinta.

11 Does that conclude the examination?

12 MR. CANTY: Yes, your Honor. Thank you.

13 THE COURT: Thank you very much.

14 THE WITNESS: Thank you, your Honor.

15 THE COURT: You may step down. You are excused.

16 Other than the question of the recordings, is
17 there any further evidence to be presented by the defense at
18 this point?

19 MR. LA PINTA: Not in my direct case, no.

20 Could I ask a question?

21 THE COURT: Yes, sir.

22 MR. LA PINTA: The government suggested during the
23 morning break that we do the tape playing with your Honor
24 today, the defense tape playing today, and that I provide
25 you with a transcript, as the government has a copy, and we

1 can listen and read together to see whether or not it is
2 accurate, and we can all make our own assessment of it. If
3 it turns out to be inaccurate, they will certainly bring it
4 to your attention, and I'm sure you would see that as well.
5 With that said, I think that's a fine idea. I would like to
6 do that now before I rest.

7 MR. CANTY: Your Honor, if I could just inquire
8 about how long do you think that will take?

9 MR. LA PINTA: Not that wrong. There are around
10 15 to 20 snippets. But when I tell you the snippets are
11 five seconds long to 20 seconds long, the number 20 may seem
12 a long time, but I would say in time I think it would take
13 20 minutes.

14 MR. DuCHARME: That's acceptable from my point of
15 view. My only concern is we have two witnesses we would
16 like to present live testimony today and complete the
17 hearing. We think we can get our witnesses up and down in
18 an hour and a half. As long as this proposed schedule fits
19 within the court's proposed schedule today, we have no
20 objection. We need to end today in the middle of an
21 examination of a live witness.

22 THE COURT: One of the problems left today is that
23 I have to leave here at four o'clock, number one.

24 Number two, with respect to the tapes, some of
25 them -- because typically as we know the foundation is laid,

1 the participant of the conversation would identify who is
2 saying -- which voice is being heard, which I, for instance,
3 when you played it before, I had no idea who was who. Do
4 you know what I mean? So, I'm not sure what you are telling
5 me. You are telling me to play the snippets, which are
6 20 minutes.

7 MR. LA PINTA: Around there.

8 THE COURT: You have two witnesses, which are live
9 witnesses, that you want to be on today. You won't be able
10 to complete them, given the time constraints I just
11 mentioned. Maybe we can do the snippets and have the one
12 witness, and then pick a particular day next week and have
13 the second witness.

14 MR. DuCHARME: I have a couple of suggestions for
15 our collective considerations. One is, I believe that
16 Mr. La Pinta is going to play excerpts of recordings that he
17 has referenced and quoted in his sentencing submissions,
18 without a live witness to provide context other than
19 explain. The government frankly has no objection to the
20 recordings that Mr. La Pinta is referring to being admitted
21 as an exhibit in this proceeding.

22 (Continued on the next page.)
23
24
25

1 MR. DUCHARME (Cont'd): We are willing to accept
2 that the transcripts are at least good faith drafts that
3 are designed to assist the court in reviewing those
4 materials.

5 So I'm not entirely sure what playing them in
6 this environment absent the testimony of a witness to
7 explain them contributes to the hearing if we are willing
8 to just stipulate that they may come in, that the court
9 may consider them, that the draft transcripts may assist
10 the court.

11 So, your Honor, we would be willing to stipulate
12 that those are admissible for the court's consideration
13 and then proceed with the live witness and the court can
14 consider both the transcripts and the recordings as part
15 of the complete record. It's my suspicion that may be the
16 most efficient way to deal with this, but we are open to
17 any suggestion.

18 THE COURT: But the live witness would focus his
19 or her testimony at least in part on what appears in these
20 audio transcripts?

21 MR. DUCHARME: Ours will, yes. Our witness is
22 able to explain the context, certain terms through his
23 experience and training, what certain terms mean, and in
24 that way we think our live witness contributes and
25 complements the recordings.

1 If what Mr. La Pinta is saying I just want these
2 recordings in as part of the record and I want my proposed
3 transcripts to be part of the court's consideration, we
4 have no objection to that. We think your Honor should be
5 entitled to consider any of the recordings that the
6 defense wants to offer.

7 MR. LA PINTA: I guess my response is that I
8 have the same ambitions and desires for you to hear these
9 in open court as they do and which they plan on doing in a
10 little while.

11 I just feel instinctively that perhaps I'm at a
12 disadvantage that if you hear live recordings of
13 Mr. Kaliebe and the operative on their end and you don't
14 hear them from my end, that perhaps they would have a
15 different impact on you in your assessment of the
16 relevance and importance of the case.

17 In other words, reading it is a whole lot
18 different than hearing it.

19 THE COURT: Yes, by thought what you were going
20 to do was play them.

21 MR. DUCHARME: We have no objection to that,
22 your Honor.

23 MR. LA PINTA: Let's try that.

24 If you want to call your witness first and we
25 can get him done, I have no problem with that as well.

1 MR. DUCHARME: I think it would be our
2 preference, Judge, if we have to take your suggestion,
3 which is to play these tapes, call our first witness and
4 then resume this hearing at a later date to be determined
5 by the court, that's perfectly fine.

6 We want a complete record.

7 THE COURT: That's what we'll do, then.

8 Someone is going to have to identify who is
9 speaking because I have no idea.

10 MR. LA PINTA: I will.

11 So to facilitate what's being said, I don't know
12 if you have my February 16th, 2015 submission in front of
13 you.

14 THE COURT: I do.

15 MR. LA PINTA: If you do, I'll direct you to
16 page five of the body of it and that will identify which
17 recordings I'm playing beforehand, the parties and, in my
18 assessment, the relevance of it, if that's okay with you.

19 THE COURT: I'm looking at page five of the
20 February 16th letter.

21 MR. LA PINTA: Yes.

22 I'm going to start on page five and I'll give
23 the disk number, the date and the time stamp of each
24 recording, identify the parties and my relevance statement
25 regarding that.

1 MR. DUCHARME: Your Honor, the only objection we
2 would have would be long argumentative statements of
3 relevance.

4 Those can certainly be made in the briefs. We
5 would hope we could use this time to complete the record.

6 THE COURT: What I they we ought to do is get
7 the evidence before the court, absent contemporaneous
8 commentary we can have a summation at the conclusion or
9 whatever.

10 But I don't --

11 MR. LA PINTA: Perhaps offer you on page five
12 you can look at what's on the right side of the chart
13 that's labeled relevance, that's all I'm looking to say,
14 it's one sentence for each recording.

15 MR. DUCHARME: And that's clearly argument,
16 Judge.

17 THE COURT: That's clearly argument. So that I
18 don't need.

19 Plus I have it in a written summation plus I
20 will hear from counsel later.

21 MR. LA PINTA: I guess my question is how is it
22 different than their witness explaining it and arguing it
23 from that witness's point of view?

24 THE COURT: Well, No. 1, it's not appropriate
25 for the court to get into a debate.

1 I'm certainly prepared to explain any ruling I
2 make, but we are not going to get into that type of
3 dialogue.

4 MR. LA PINTA: Thank you.

5 THE COURT: And I guess the difference is you
6 are not a participant to the conversations. You are an
7 individual who has listened to the tape and you have drawn
8 as an advocate and appropriately certain conclusions as to
9 the significance of the information.

10 The person who participates in the conversation
11 will not be able to indicate, for instance, this is where
12 I tried to do X, Y, and Z. I wouldn't permit that, but he
13 will be able to identify the attendant circumstances, who
14 was present, the length of time involved, that type of
15 thing. One is argument, the other is factual assertions
16 from somebody with firsthand information. That's the
17 difference.

18 Now that I just explained we are not going to
19 have argument, you got one half of the argument anyway and
20 we'll end it at that point.

21 MR. LA PINTA: Very good.

22 We are loading up the computer. First referring
23 to disk five, May 2, 2012, from the times 2100 to 2230,
24 the participants are UC 1 and Justin Kaliebe.

25 (Tape played.)

1 (Tape stopped.)

2 MR. LA PINTA: The next recording is the same
3 day, May 2, 2012, from two minutes and 19 seconds, two --
4 I'm sorry -- hour 2:19:45 between UC 1 and Justin Kaliebe.

5 (Tape played.)

6 (Tape stopped.)

7 MR. LA PINTA: The next recording, No. 3, is
8 disk nine, part B, June 1, 2012, time stamp 2-36,
9 Justin Kaliebe speaking to the UC 1.

10 (Tape played.)

11 (Tape stopped.)

12 MR. LA PINTA: The next one is on page six of my
13 submission, top of the page, time stamp 51-43, spoken by
14 UC 1.

15 (Tape played.)

16 (Tape stopped.)

17 MR. LA PINTA: No. 5 is the one below that, time
18 stamped 54:55, spoke by UC 1 to Justin Kaliebe.

19 (Tape played.)

20 (Tape stopped.)

21 MR. LA PINTA: I direct your attention now to
22 the middle of page six, disk No. 11, time stamp 2:40 to
23 2:41, speaker UC 1 and Mr. Kaliebe.

24 MR. DUCHARME: I'm sorry, if I can just
25 interrupt for one second.

1 Your Honor, we are hearing discrepancies between
2 what we are hearing on the recording and what we are
3 seeing in the transcript. We will obviously defer to the
4 court on whether or not the transcripts are accurate. But
5 we have to preserve an objection to some of what's in the
6 transcript.

7 From our point of view it's not matching up.

8 THE COURT: If you are going to preserve the
9 objection in any meaningful fashion, you are going to
10 indicate the particular language that you find is suspect
11 in the sense you don't agree with what was said on the
12 tape.

13 MR. DUCHARME: Yes, your Honor.

14 Well, with respect to the last recording that we
15 heard, we were trying to closely track what's in the
16 written submission on page six with what we heard on the
17 recording, and we heard a significant discrepancy between
18 what we read and what we heard and, in particular, there
19 is a line that says we can talk about how we can get ready
20 for the trip in the context of other statements.

21 And we could not follow the recording with what
22 we were seeing here. That's a specific objection.

23 THE COURT: That's the entry of 54:55.

24 MR. DUCHARME: That's correct, your Honor.

25 The other discrepancies we heard, I think, are

1 arguably not material. So we don't see a need to
2 specifically preserve those.

3 THE COURT: This one I will put a question mark
4 to and it can be appropriately addressed later.

5 MR. DUCHARME: Thank you, your Honor.

6 MR. LA PINTA: I direct the court's attention to
7 page seven, disk 15, September 12, 2012, time stamped 5:45
8 through seven minutes.

9 (Tape played.)

10 (Tape stopped.)

11 MR. LA PINTA: I direct the court's attention to
12 disk 16, dated September 14, 2012, time stamp 1:45 by UC
13 1.

14 This is now recording No. 8.

15 (Tape played.)

16 (Tape stopped.)

17 MR. DUCHARME: Your Honor, we'd like to preserve
18 an objection to the transcript that we just heard with the
19 last recording.

20 Again, we are doing our best to track it, but I
21 could not match up what we heard to what's in the
22 transcript.

23 THE COURT: The entry I should look at is time
24 stamped what?

25 MR. DUCHARME: 1:45 on disk 16.

1 THE COURT: I put a question mark next to that.

2 MR. DUCHARME: Thank you, your Honor.

3 THE COURT: I will note that when we started
4 this exercise the government said that they felt that the
5 transcripts were sufficiently accurate to warrant being
6 played.

7 I have no problem with this, but I just note
8 typically there would be a witness on the stand but, in
9 any event, we'll proceed as we are.

10 MR. DUCHARME: Thank you, your Honor.

11 THE COURT: And if anybody wants to change the
12 procedure, we can revisit it at the appropriate time.

13 Go ahead, Mr. La Pinta.

14 MR. LA PINTA: I apologize.

15 These recordings are not the best and I spent a
16 ton of time trying to be accurate and I appreciate your
17 patience, your Honor.

18 THE COURT: Yes, sir.

19 MR. LA PINTA: No. 9 is time stamped 1:49 by UC
20 1, again disk 16, September 14, 2012.

21 (Tape played.)

22 (Tape stopped.)

23 MR. LA PINTA: I direct your attention to page
24 eight, recording No. 10 is at the top of that page, time
25 stamp 1:15:20 involving Mr. Kaliebe and UC 1.

1 (Tape played.)

2 (Tape stopped.)

3 MR. LA PINTA: I direct your attention to disk
4 23 on page eight, same page, December 11, 2012, time stamp
5 2:31.

6 This is recording No. 11.

7 (Tape played.)

8 (Tape stopped.)

9 MR. LA PINTA: Please turn to page nine, time
10 stamp 2:56 between UC 1 and Mr. Kaliebe.

11 Once again, this is disk 23, December 11, 2012,
12 recording No. 12.

13 (Tape played.)

14 (Tape stopped.)

15 MR. LA PINTA: Judge, I'm going to withdraw that
16 one. Apparently there is a problem with the recording in
17 that one.

18 THE COURT: Yes, sir.

19 MR. LA PINTA: I withdraw No. 12.

20 I direct your attention to time stamp 10 to
21 10:40, between Mr. Zea, UC 1 and Justin. I offer this as
22 recording 13.

23 (Tape played.)

24 (Tape stopped.)

25 MR. LA PINTA: I direct your attention to page

1 ten, disk No. 29 dated January 11, 2013, time stamp
2 1:03:54, speaker is UC 1, No. 15, tape recording No. 15.

3 (Tape played.)

4 (Tape stopped.)

5 MR. LA PINTA: I will consent that the
6 audibility, in light of what's been played in the
7 courtroom, is almost impossible.

8 I will withdraw No. 15.

9 THE COURT: All right.

10 MR. LA PINTA: Just so you understand and for
11 the record, your Honor, when I made these transcripts I
12 was wearing earphones and I was able to direct the speed
13 of it to be slower.

14 THE COURT: Yes.

15 MR. LA PINTA: I'm not able to do that here
16 obviously, so it's a little bit different than when I
17 first heard.

18 I direct your attention to the same page ten,
19 disk 29, dated January 11, 2013, time stamp 1:06. This is
20 recording No. 16 between UC 1 and Mr. Kaliebe.

21 (Tape played.)

22 (Tape stopped.)

23 MR. LA PINTA: I direct your attention to page
24 11, the last page, top of the page we are referring once
25 again to disk 29, January 11, 2013, time stamp 2:33, a

1 recording of Mr. Kaliebe.

2 I offer this as recording No. 17.

3 (Tape played.)

4 (Tape stopped.)

5 MR. LA PINTA: Below that at time stamp 2:35,

6 also on the same disk No. 29 dated January 11, 2013

7 involving UC 1 and Justin Kaliebe.

8 This is recording No. 18.

9 (Tape played.)

10 (Tape stopped.)

11 MR. LA PINTA: I refer you to the same page 11,

12 disk 31, January 16, 2013, time stamp 3:35, I offer this

13 as recording 19 involving UC 1 and Justin.

14 (Tape played.)

15 (Tape stopped.)

16 MR. LA PINTA: Lastly, but not leastly, No. 20

17 is disk 31, January 16, 2013, time stamp 1:27, UC 1 and

18 Justin.

19 (Tape played.)

20 (Tape stopped.)

21 MR. LA PINTA: That concludes my recordings.

22 Thank you.

23 THE COURT: Very good.

24 MR. LA PINTA: I hope they were valuable to the

25 court.

1 THE COURT: I'm sorry. I didn't hear.

2 MR. LA PINTA: I said I hope they were valuable
3 to a certain extent.

4 THE COURT: Yes, sir.

5 MR. DUCHARME: Your Honor, if I may.

6 I have been conferring with Mr. Canty and here
7 is the situation we have. We have two witnesses. We
8 don't believe we can complete the testimony of either
9 witness in the remaining time. We are mindful of the
10 court's time certainly and if it's your preference we
11 begin a witness, we will do it, Judge.

12 But I think it would be our suggestion that we
13 might pick a mutually-agreeable date given the hour when
14 we can resume because of the importance of this matter
15 unfortunately to both sides.

16 THE COURT: I think that's reasonable, some type
17 of continuity with the next two witnesses is preferable to
18 having it bifurcated and truncated in some way.

19 What I'll ask you to do is check with Ms. Lundy
20 and she'll check with our schedule and tell you what time
21 is available. She will set it aside and even add some
22 other extra so we don't run out of time on the next
23 occasion.

24 MR. CANTY: Thank you, Judge.

25 MR. DUCHARME: Thank you, your Honor.

1 MR. LA PINTA: Thank you, your Honor.

2 THE COURT: Thank you, everybody.

3 THE CLERK: We are adjourning the case to July
4 19th at 10 a.m.

5 (The trial was adjourned until Tuesday, July
6 19th, 2016, at 10 a.m.)

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